DOCKET

(1)

No. 89-5011-CSY
Status: GRANTED

Title: Larry Joe Powers, Petitioner
v.
Ohio

Docketed:
June 30, 1989

Court: Court of Appeals of Ohio,
Franklin County

Counsel for petitioner: Lane,Robert L.

Counsel for respondent: Miller,Michael, Travis,Alan C.

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jul 24 1989		Brief of respondent Ohio in opposition filed.
4	Aug 3 1989		DISTRIBUTED. September 25, 1989
5	Feb 2 1990		REDISTRIBUTED. February 16, 1990
7	Feb 20 1990		Petition GRANTED.
			**********
10	Mar 6 1990		Joint appendix filed.
8	Mar 12 1990	G	Motion of petitioner for appointment of counsel filed.
9	Mar 19 1990		DISTRIBUTED. MARCH 23, 1990.
12	Mar 22 1990		Order extending time to file brief of petitioner on the merits until April 20, 1990.
13	Mar 26 1990		Motion for appointment of counsel GRANTED and it is ordered that Robert L. Lane, Esquire, of Columbus, Ohio, is appointed to serve as counsel for the petitioner in this case.
14	Apr 20 1990		Brief amicus curiae of Ohio Association of Criminal Defense Lawyers filed.
15	Apr 20 1990		Brief amicus curiae of Criminal Justice Legal Foundation filed.
16	Apr 20 1990		Brief amici curiae of ACLU, et al. filed.
17	Apr 20 1990		Brief of petitioner Larry J. Powers filed.
18	May 18 1990		Brief of respondent Ohio filed.
19	Jul 2 1990		CIRCULATED.
20	Jul 10 1990	X	Reply brief of petitioner Larry J. Powers filed.
21	Jul 23 1990		SET FOR ARGUMENT TUESDAY, OCTOBER 9, 1990. (4TH CASE)
22	Aug 21 1990		Record filed.
		*	1 vol.-lower court record
23	Aug 21 1990		Record filed.
		*	1 vol., Court of Common Pleas, Franklin Co.
24	Oct 9 1990		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. _____

(2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

89-5011

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, OH 43266-0587
614/466-5394

COUNSEL FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

IN A CRIMINAL CASE, DOES A WHITE DEFENDANT HAVE STANDING TO CHALLENGE THE REMOVAL, BY THE PROSECUTION, OF BLACK PROSPECTIVE JURORS UNDER **BATSON V. KENTUCKY**, 476 U.S. 79 (1986)?

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTORY PROVISIONS:

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Petitioner, Larry Joe Powers, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Franklin County, Ohio entered on December 13, 1988 in the proceeding entitled **State of Ohio v. Larry Joe Powers**, Case Number 89-254, and the judgment of the Supreme Court of Ohio in the case entitled **State of Ohio v. Larry Joe Powers**, Case Number 89-254, in which the Supreme Court of Ohio overruled petitioner's motion for leave to appeal on April 5, 1989 and overruled petitioner's motion for rehearing on May 3, 1989.

OPINIONS BELOW

The Opinion of the Court of Appeals of Franklin County, Ohio is unreported, but is attached in the Appendix at A-3.

The Supreme Court of Ohio did not render an opinion, but rather rendered entries overruling Petitioner's motion for leave to appeal and motion for rehearing. Those entries are attached in the Appendix at A-1 and A-2, respectively.

JURISDICTION

On May 3, 1989, the Supreme Court of Ohio ordered that Petitioner's motion for rehearing be denied. Petitioner now timely files this petition within sixty (60) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States which provide in pertinent part:

SIXTH AMENDMENT

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

On August 8, 1985, the Franklin County Grand Jury returned an indictment charging Larry Joe Powers, Petitioner herein, with two counts of Aggravated Murder, violations of Ohio Revised Code

Section 2903.01, and one count of Attempted Aggravated Murder, a violation of Ohio Revised Code Sections 2923.02 and 2903.01. Petitioner pled not guilty to these charges and the case proceeded to a jury trial.

During **voir dire**, the State of Ohio used seven (7) of ten (10) peremptory challenges to exclude Blacks from the jury. Each time, the defense objected to the State's discriminatory use of its peremptory challenges and requested that the trial court compel the prosecutor to explain, on the record, his reasons for excluding Blacks. Much to the prejudice of Larry Joe Powers, the court overruled the Petitioner's objections and failed to require the State to explain its reasons for using its peremptory challenges in a racially discriminatory manner. (Tr. Vol. 5, pp. 907, 908; Tr. Vol. 6, pp. 1220, 1374, 1375, 1549-1553; Tr. Vol. 7, pp. 196, 197; Tr. Vol. 8, pp. 1982, 2281.)

Petitioner was ultimately found guilty of one count of Murder, a violation of Ohio Revised Code Section 2903.02, one count of Aggravated Murder and one count of Attempted Aggravated Murder. The trial court sentenced petitioner to an aggragated sentence of fifty-three (53) years to life in the Ohio penal system.

Petitioner filed a timely appeal in the Franklin County, Ohio Court of Appeals. On December 13, 1988, the Court of Appeals rendered an opinion overruling Petitioner's appeal and affirming his conviction. **State v. Powers**, Franklin App. No. 87 AP-526, unreported. (December 13, 1988) (Attached in Appendix at A-3.)

Petitioner then filed a motion for leave to appeal in the Supreme Court of Ohio. On April 5, 1989, the Supreme Court overruled petitioner's motion. **State v. Powers**, Supreme Court of Ohio, Case No. 89-254, Entry, (April 15, 1989) A-1. Petitioner filed a motion for rehearing in the Supreme Court of Ohio. On

May 3, 1989, the Supreme Court overruled that motion. **State v. Powers**, Supreme Court of Ohio, Case No. 89-524, Rehearing Entry, (May 3, 1989). A-2.

A. HOW THE FEDERAL ISSUES WERE RAISED AND DECIDED BELOW

During **voir dire**, Petitioner's counsel objected to the State's discriminatory use of its peremptory challenges and requested that the trial court compel the prosecutor to state its reasons, on the record, for using his peremptory challenges to exclude blacks from the jury. (Tr. Vol. 5, pp. 907, 908; Tr. Vol. 6, pp. 1220, 1374, 1375, 1579-1553; Tr. Vol. 7, pp. 196, 197; Tr. Vol. 8, pp. 1982, 2281). In all instances, the trial court overruled Petitioner's objections and refused to compel the prosecution to place its reasons on the record. The prosecution and Petitioner discussed the applicability of this Court's decision in **Batson v. Kentucky**, 476 U.S. 79 (1986). (Tr. Vol. 6, pp. 1550-1552; Tr. Vol. 7, p. 197). Petitioner argued that the State is obligated, under **Batson**, to put on the record its reasons for peremptorily challenging prospective jurors on the basis of race. (Tr. Vol. 6, p. 1552). The defense further argued that Petitioner, regardless of his race, has a right to a jury of his peers; of a cross-section of the community; and of all races and backgrounds. (Tr. Vol. 6, p. 1552).

After his conviction, Petitioner filed a timely appeal in the Franklin County Court of Appeals in which he argued that his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to equal protection were violated by the prosecutor's discriminatory use of his peremptory challenges, citing **Batson v. Kentucky** and other appropriate cases. Additionally, Petitioner argued that he had standing to raise this issue despite the fact that he is white and the prospective

jurors who were excluded were black. The Court of Appeals rejected Petitioner's argument. The Court refused to extend the constitutional protections of **Batson v. Kentucky** to a white defendant where the prosecutor has used peremptory challenges to remove black prospective jurors. **State v. Powers**, Fourth Assignment of Error. (A-4, A-10 through A-21).

After the Court of Appeals overruled this and the other assignments of error and affirmed Petitioner's conviction, Petitioner filed a memorandum in support of jurisdiction, seeking leave to appeal in the Supreme Court of Ohio. In his first proposition of law, Petitioner again argued that he had standing to challenge the prosecution's discriminatory use of peremptory challenges which excluded prospective jurors who are not of Petitioner's race. Petitioner again claimed that the prosecutor's improper use of his peremptory challenges violated Petitioner's right to trial by jury under the Sixth Amendment and his right to equal protection under the Fourteenth Amendment, citing **Batson v. Kentucky** and other appropriate cases.

REASONS FOR GRANTING THE WRIT

I. THIS COURT NEEDS TO SETTLE THE QUESTION AS TO WHETHER OR NOT A WHITE DEFENDANT HAS STANDING TO CHALLENGE THE REMOVAL, BY THE PROSECUTION, OF BLACK PROSPECTIVE JURORS.

Batson v. Kentucky, 476 U.S. 79 (1986) reaffirmed the principle of **Strauder v. West Virginia**, 100 U.S. 303 (1880), in which the Supreme Court held that a State denies a black defendant equal protection when he is tried before a jury from which other blacks have been excluded. **Batson**, at 85, 86.

In the case at bar, the trial court denied Larry Joe Powers his Fourteenth Amendment right to equal protection when it overruled Petitioner's objections. Those rulings permitted the prosecution to remove black prospective jurors and relieved the

prosecution of its duty to state its reasons for removing those jurors on the record.

In addition, the trial court's rulings denied Petitioner his Sixth Amendment right to a jury which reflects a fair cross-section of the community. **Williams v. Florida**, 399 U.S. 78, 100 (1970). **Booker v. Jabe**, 775 F. 2d 762 (C.A. 6, 1985), vacated and remanded for reconsideration 478 ___ U.S. ___, 106 S.Ct. 3289, 92 L.Ed. 2d 705 (1986), reinstated on remand, 801 F. 2d 871 (C.A. 6, 1986).

In the instant case, Petitioner, Larry Joe Powers, is white. However, the holding in **Batson** should not preclude the issue being raised by a white defendant. In fact, the interest of <u>black jurors</u> is as much a focus of the decision in **Batson** as is the defendant's interest:

> While we respect the views expressed in Justice Marshall's concurring opinion, concerning prosecutorial and judicial enforcement of our holding today, we do not share them. <u>**The standard we adopt under the federal constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race**</u>.
>
> * * *
>
> 476 U.S. 89, in 22 (emphasis added.).

Strauder v. West Virginia involved a black defendant who was denied equal protection when tried by a jury from which blacks were excluded. But **Strauder** by its own terms comprehends more than simply equal protection for black criminal defendants. As stated by Justice Powell for the **Batson** majority:

> In **Strauder**, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to government discrimination on account of race. [100 U.S.] at 306-307, 25 L. Ed. 664. <u>**Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure**</u>.
>
> 476 U.S. at 85 (emphasis added).

Strauder and **Batson** both target invidious discrimination by the State during jury selection. The situation is most likely to occur when a black defendant is on trial because of the State attorney's facile assumption that blacks cannot fairly and impartially try blacks. But this is not the only factual situation where race prejudice in jury selection occurs. It is simply the most obvious.

The United States Supreme Court has previously held that a white defendant has standing to challenge the exclusion of Blacks from the grand and petit juries which indicted and convicted him. **Peters v. Kiff**, 407 U.S. 493 (1972).

> "Accordingly, we hold that whatever his race a criminal defendant has standing to challenge the system used to select his grand or petit jury on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case where the claim is that Negroes where systematically excluded from jury service. For Congress has made such exclusion a crime. 18 U.S.C. § 243." **Id.** at 504 and 505. Emphasis added.

Subsequently, in **Taylor v. Louisana**, 419 U.S. 522 (1975), a majority group member, a male, successfully challenged a statute limiting representation of women on state court venires. The Court wrote: "[T]here is no rule that claims such as **Taylor** presents may be made only by those defendants who are members of the group excluded from jury service." **Id.** at 526.

The Supreme Court of Arizona has recently held that a white defendant has standing to challenge the prosecutor's discriminatory use of peremptory challenges to exclude blacks from the petit jury. **State v. Superior Court, County of Maricopa, (Gardner)**, 157 Ariz. 541, 760 P. 2d 541 (1988).

In that case, the Arizona Supreme Court noted:

> Defendant argues that under the sixth amendment to the federal constitution his right to an "impartial jury" includes the opportunity to obtain a jury comprising a fair cross-

> section of the public. This principle is well established.
>
> . . .
>
> Obviously, this right is implicated not only when those rejected for discriminatory motives are members of the defendant's own racial or ethnic group. This discriminatory exclusion of jurors from any cognizable group necessarily violates the right to a chance for a fair cross-section, no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge or any party to the action.
>
> **Id.** at 545, 546 (citations omitted).

In dealing with this issue in the instant case, the Franklin County, Ohio Court of Appeals improperly dismissed the Arizona Supreme Court's decision, stating:

> We are cognizant that defendant also relies upon an Arizona decision permitting a white defendant to raise the issue of discriminatory exclusion of blacks from his jury by the prosecutorial use of peremptory challenges, resulting in a jury including no blacks. However, in that case, although the defendant was white, his defense attorney was black.

State v. Powers, Franklin App. No. 87AP-526, at p. 17, unreported (Dec. 13, 1988). The Court of Appeals was correct in stating that the Arizona defendant was white and his attorney was black. However, the attorney's race was not the reason the Arizona Supreme Court ruled as it did. The Supreme Court specifically said that the right to an impartial jury comprised of a fair cross section of the public was implicated regardless of the racial or ethnic characteristics of the defendant or his lawyer. **State v. Superior Court, supra**, at 546 (emphasis added).

In **Stanley v. State**, 542 A. 2d 1267 (1988), the Court of Appeals of Maryland ruled that, even though three of the final jurors in that case were black, the defendant could still make a **prima facie** showing that the prosecution was using its peremptory challenges in a discriminatory manner. **Id.**, at 1275, 1278. The holding in **Stanley** applies to the instant case because the record

in the instant case is silent as to the racial make-up of the final jury. Under **Stanley**, it does not matter whether Larry Joe Powers' jury was all white or partially black. Even if there might have been black jurors on Mr. Power's jury, the defense still made a **prima facie** showing of discrimination. The trial court should have prohibited the prosecutor's discriminatory use of peremptory challenges and should have compelled the prosecutor to explain its reasons for perempting black jurors. **Batson, supra.**

In order to have an impartial jury as provided by the Sixth Amendment and to enjoy the protections provided by the Due Process Clause of the Fourteenth Amendment, a white defendant must have standing to challenge the prosecution's discriminatory use of peremptory challenges.

II. THE DECISION OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF ARIZONA AS TO WHETHER OR NOT A WHITE DEFENDANT HAS STANDING TO CHALLENGE THE REMOVAL, BY THE PROSECUTION, OF BLACK PROSPECTIVE JURORS UNDER BATSON V. KENTUCKY, 476 U.S. 79 (1986). STATE V. SUPERIOR COURT, COUNTY OF MARICOPA, (GARDNER), 157 ARIZ. 541, 760 P.2d 541 (1988).

The decision of the Franklin County Court of Appeals in the instant case is clearly in conflict with the decision rendered on this issue by the Arizona Supreme Court in **State v. Superior Court, County of Maricopa, (Gardner)**, 157 Ariz. 541, 760 P.2d 541 (1988).

In the case at bar, the Court of Appeals for Franklin County stated:

> As clearly and unequivocally stated in **Batson**, the defendant must first show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Here, defendant complains not of removing jurors of his race by prosecutorial use of peremptory challenges but, instead, complains because members of another race were excluded. Defendant has completely failed to meet the first test of **Batson.**

State v. Powers, Franklin App. No. 87AP-526, unreported (December 13, 1989) at A-18.

The Court went on to hold that:

> Where the members of the defendant's race have not been excluded from jury service by the use of peremptory challenges by the prosecution, the prosecution need not explain its use of peremptory challenges to exclude the members of another race from the jury, in the absence of a demonstration by the defendant that such exclusion was systematic and results in prejudice to the defendant or, in effect, denies him a fair trial. The **Batson** rule is slightly different if members of the defendant's race are systematically excluded by the prosecution by use of peremptory challenges.
>
> Accordingly, defendant has not met the threshold conditions necessary to require the State to explain its use of peremptory challenges, and the fourth assignment of error is not well-taken.

State v. Powers, Id., A-20, A-21.

In **State v. Superior Court, supra**, the Supreme Court of Arizona provided the white defendant with the standing to challenge the prosecution's removal of black prospective jurors. The defendant in the Arizona case was granted a federal right that was denied Larry Joe Powers.

III. THIS COURT SHOULD GRANT LARRY JOE POWERS' PETITION FOR A WRIT OF CERTIORARI BECAUSE IT PRESENTS ISSUES IDENTICAL TO THE ISSUES PRESENTED IN HOLLAND V. ILLINOIS, CASE NO. 88-5050, WHICH IS CURRENTLY PENDING IN THIS COURT.

On February 27, 1989, this Court granted a petition for writ of certiorari in the case of **Daniel Holland v. The State of Illinois**, Case No. 88-5050. That case presents questions that are identical to the issues in the instant case. The questions presented in **Holland v. Illinois** are as follows:

1. Does state's use of peremptory challenges to remove black prospective jurors on grounds of race violate Sixth Amendment right to trial by jury? 2. Did white petitioner have standing to challenge, under decision in **Batson v. Kentucky**, prosecutor's removal of black prospective jurors from jury?

44 Criminal Law Reporter 4193.

Petitioner Larry Joe Powers should be granted a writ of certiorari since his case is so closely aligned with that of **Holland v. Illinois**.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals of Franklin County, Ohio.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587
614/466-5394

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b), Rules of the Supreme Court, I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Court of Appeals of Franklin County, Ohio was served on respondent State of Ohio by forwarding a copy to the office of its counsel, Michael Miller, Franklin County Prosecutor, Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio 43215, by U.S. Mail on this 30th day of June, 1989. I further certify that all parties required to be served have been served.

ROBERT L. LANE
Chief Appellate Counsel

COUNSEL FOR PETITIONER

No._____

_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

_____

TIMOTHY J. HOLMES,

Petitioner,

v.

STATE OF OHIO,

Respondent.

_____

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

_____

APPENDIX

_____

The Supreme Court of Ohio

1989 TERM

To wit: April 5, 1989

State of Ohio, Appellee,	:	Case No. 89-254
v.	:	E N T R Y
Larry Joe Powers, Appellant.	:	89-225

Upon consideration of the motion for leave to appeal from the Court of Appeals for Franklin County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 87AP526)

THOMAS J. MOYER
Chief Justice

ON COMPUTER

The Supreme Court of Ohio

1989 TERM

To wit: May 3, 1989

State of Ohio, Appellee,	:	Case No. 89-254
v.	:	REHEARING ENTRY
Larry Joe Powers, Appellant.	:	(Franklin County)

89-296

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 87AP526)

Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, Plaintiff-Appellee,	:	
v.	:	No. 87AP-526
Larry Joe Powers, Defendant-Appellant.	:	(REGULAR CALENDAR)

O P I N I O N

Rendered on December 13, 1988

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. PATRICK E. SHEERAN, for appellee.

MR. RANDALL M. DANA, Ohio Public Defender, MR. ROBERT L. LANE and MR. JERRY L. McHENRY, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

WHITESIDE, P.J.

Defendant, Larry Joe Powers, appeals from a jury decision of the Franklin County Court of Common Pleas and raises eight assignments of error, as follows:

> "1. As a matter of law, the trial court erred by failing to grant appellant's motion for a directed verdict of acquittal as to the issue of prior calculation and design, made pursuant to Rule 29(A), of the Ohio Rules of Criminal Procedure.
>
> "2. As a matter of law, Larry Joe Powers' conviction for the aggravated murder of Thomas Kicas and the attempted aggravated murder of Charlotte Golden are not supported by sufficient evidence, and should be reversed.

"3. The trial court erred by overruling appellant's pre-trial motion to dismiss the indictment on the ground that Ohio's death penalty statute is violative of the United States and Ohio Constitutions. This resulted in a denial of Mr. Powers' right to due process of law and a fair trial guaranteed him by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and by Section 10, Article I of the Ohio Constitution.

"4. The trial court erred to the prejudice of appellant by permitting the discriminatory use of peremptory challenges by the state to exclude blacks from the jury and by failing to compel the state to explain its reasons for perempting black jurors, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution.

"5. The trial court erred to the prejudice of the appellant by admitting irrelevant, hearsay testimony into evidence.

"6. The trial court erred in allowing state's witness, Dorothy Twiss, to testify.

"7. Larry Joe Powers was denied a fair trial as guaranteed him by the Fifth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution by the prosecution's misconduct in closing argument.

"8. Larry Joe Powers was denied his right to effective assistance of counsel as guaranteed him by the Sixth and Fourteenth Amendments of the United States Constitution and by Article I, Section 10 of the Ohio Constitution, as well as due process of law protections under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Ohio Constitution."

On the evening of Friday, July 26, 1985, defendant, Gary Golden, and Thomas Kicas were at Bernard's Grill. In the early hours of Saturday, July 27, 1985, all three met at Golden's home where Charlotte Golden, Golden's ex-wife, also resided. At one point, all three men and Charlotte Golden were in the basement of the home where defendant's gun was

placed on a bar stool. After briefly leaving the room and then returning, defendant shot and killed Gary Golden and Thomas Kicas. Charlotte Golden claimed that defendant shot at her.

Defendant was indicted on the following counts: count one, aggravated murder in the death of Gary Golden, a violation of R.C. 2903.01; and count two, aggravated murder in the death of Thomas Kicas. Each of these counts contained a specification alleging that the conduct involved the purposeful killing or attempt to kill two or more persons pursuant to R.C. 2929.04(A)(5) and a specification alleging that defendant had a firearm. The second count contained a specification that defendant committed aggravated murder of Kicas in order to escape detection, apprehension, trial, or punishment for the aggravated murder of Golden. Count three charged defendant with the attempted aggravated murder of Charlotte Golden, a violation of R.C. 2903.01 and 2923.02. This count also contained a firearm specification.

A jury found defendant guilty of the murder of Gary Golden in violation of R.C. 2903.02, guilty of the aggravated murder of Thomas Kicas in violation of R.C. 2903.01, and guilty of attempted aggravated murder of Charlotte Golden in violation of R.C. 2903.01 and 2923.02. The jury found firearm specifications were proven as to all three verdicts. After a mitigation hearing, the trial court imposed the following sentence upon defendant: fifteen years to life as to count one; thirty years to life as to count two with a three-year term of actual incarceration for the use of a firearm; and five to twenty-five years as to count three. All sentences were ordered to run consecutively.

Defendant, by his first and second assignments of error, contends that the trial court erred when it failed to grant defendant's motion for a directed verdict as to the issue of prior calculation and design, and contends that the jury verdicts of aggravated murder and attempted aggravated murder were unsupported by the evidence.

Crim. R. 29(A) requires the court, upon motion of defendant or on its own motion and after evidence on either side is closed, to order entry of judgment of acquittal of one or more offenses if the evidence is insufficient to sustain a conviction for such offense or offenses. A trial court must grant a motion for acquittal on any issue if, when viewing the evidence in a light most favorable to the state, reasonable minds can reach only one conclusion and that conclusion is favorable to defendant. In this case, defendant moved for a directed verdict of acquittal as to the issue of prior calculation and design at the close of plaintiff's case-in-chief and again at the conclusion of the defendant's own case.

R.C. 2903.01 requires that, in order for a person to be found guilty of aggravated murder, the murderer's act must be committed with "prior calculation and design." The Ohio Supreme Court in State v. Cotton (1978), 56 Ohio St. 2d 8, stated that the term "prior calculation and design" presents a standard more stringent than the previous standard of "deliberate and premeditated" in that it does not encompass instantaneous deliberation. Later, the Ohio Supreme Court, following and approving Cotton, supra, stated in the first paragraph of the syllabus of State v. Robbins (1979), 58 Ohio St. 2d 74, that:

> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the

> homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified. ***"

In Cotton, supra, the defendant shot his victim, a police officer, scuffled with a second police officer, and then ran back toward his car where he stopped near the first officer, assumed a shooting position, and, with his gun in both hands, shot and killed the first officer. In Robbins, supra, the defendant, after an argument, struck his victim briefly, left the room, and returned with a sword and proceeded to stab the victim. The court noted that there was no evidence of a heated brawl. In both Cotton, supra, and Robbins, supra, the court found sufficient prior calculation and design to sustain a conviction for aggravated murder.

Later, in State v. Reed (1981), 65 Ohio St. 2d 117, the Supreme Court found that a defendant's prior statement that if a cop gets in his way during a robbery he would blow him away was sufficiently removed in time and too general to show prior calculation and design when defendant shot and killed an officer who had stopped defendant after the officer suspected defendant of attempted robbery.

In the case before us, the prosecution presented the testimony of Charlotte Golden, the only person other than defendant who witnessed the shootings and remained alive to testify. Her testimony, if believed, showed that defendant and the two victims were in the basement recreation room of Charlotte's residence engaged in amicable conversation, that after defendant returned to the room, ostensibly having gone upstairs to the bathroom, a gun was seen on an empty bar stool between defendant and Kicas; that, although Kicas and Golden were on their third drinks, defendant had

hardly touched his; that defendant was spinning a loaded gun on the bar stool; that when Kicas said, "What are you doing with that piece?" defendant replied, "Maybe I an a hit man"; that when Golden requested defendant to put the gun away, defendant didn't acknowledge that Golden said anything, nor did defendant reply; that when Golden said in a firmer tone, "Show a little respect. This is our home. Put the thing away," defendant jumped up and shot Golden; that Kicas jumped up from the bar stool and said, "Man, wait"; that defendant said, "You are dead," which was followed by the sound of a shot; that Charlotte ran up the basement steps and, at the top, heard defendant say, "Bitch, you are dead"; that Charlotte ran outside and heard two more shots; and that Charlotte fell and looked back and saw defendant standing on her porch with a gun. Two neighbors testified that they saw defendant run to his truck and immediately and quickly drive away, one neighbor testifying that defendant did not stop at the stop sign.

When viewed in the light most favorable to plaintiff, there is sufficient evidence, if believed, that reasonable minds can conclude beyond a reasonable doubt that defendant shot Kicas and attempted to shoot Charlotte with "prior calculation and design." Unlike Reed, supra, defendant in this case made a statement about being a "hit man" immediately before the shootings of the unarmed victims. The conversation prior to the shootings was amicable, and there was no evidence of a heated brawl. The trial court did not err by refusing to grant defendant's motion for a directed verdict at the conclusion of the plaintiff's case. Nor did the trial court err by refusing to grant plaintiff's motion for a directed verdict after the conclusion of defendant's case. The state's evidence is

sufficient to allow a trier of fact to find beyond a reasonable doubt that defendant killed with prior calculation and design. In addition to plaintiff's earlier testimony, the defendant, during cross-examination, testified that he met with Brad Wellman prior to meeting Golden, that Wellman was aware that Golden was having an affair with Wellman's wife, and that the Sunday after the shootings Wellman gave defendant's wife $2,000.

There was sufficient evidence for a reasonable person to conclude beyond a reasonable doubt that defendant killed with prior calculation and design, and it was the function of the trier of fact, the jury, and not this court, to determine the credibility of each witness and based thereon also to determine innocence or guilt. The jury found a reasonable doubt as to whether the killing of Golden was with prior calculation and design. In this case, the jury was presented with two different accounts of the shooting, one by defendant and one by the surviving victim. It was for the jury to determine the credibility of each of these witnesses and to decide accordingly. Charlotte's testimony was corroborated on several points by the testimony of one neighbor who witnessed defendant exit the house and run to his truck and another who testified that defendant fired two shots from the front of the house. The neighbor's testimony corroborated Charlotte's testimony that defendant fired a total of four shots. On the other hand, defendant's testimony contradicting that of Charlotte was not corroborated. Accordingly, defendant's first and second assignments of error are not well-taken.

Defendant, by his third assignment of error, contends that R.C. 2903.01 and 2929.02, Ohio's death penalty statutes and the statutes

under which defendant was charged, violate provisions of the Ohio and United States Constitutions by permitting the arbitrary and capricious imposition of capital punishment by giving the prosecutor unfettered discretion whether to indict and to prosecute a murder as a capital offense.

It is not the prosecutor who determines an indictment. The grand jury returns all indictments, although the prosecutor may exercise great influence upon the grand jury in this regard but is not allowed to be present while the grand jury (appointed by the common pleas court) votes. See R.C. 2939.10. Freedom of choice as to whom to prosecute is not tantamount to arbitrary or capricious imposition of sentence. The United States Supreme Court has articulated guidelines for death penalty statutes in Gregg v. Georgia (1976), 428 U.S. 153, 96 S.Ct. 2909; Jurek v. Texas (1976), 428 U.S. 262, 96 S.Ct. 2950; and Florida v. Proffitt (1976), 428 U.S. 242, 96 S.Ct. 2960. In Zant v. Stephens (1983), 462 U.S. 862, 103 S.Ct. 2733, the court held that the states may constitutionally impose a sentence of death if discretion of sentencing authority is directed and limited so as to minimize the risk of wholly arbitrary and capricious activity. In addition, in United States v. Batchelder (1979), 442 U.S. 114, the Supreme Court stated that it has long been recognized that, when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest within the prosecutor's discretion, although the grand jury may investigate matters not initiated by the prosecutor. The Ohio Supreme Court in State v.

Jenkins (1984), 15 Ohio St. 3d 164, upholding the constitutionality of Ohio's death penalty statutes, quoted the United States Supreme Court in Gregg, supra, and held that the existence of discretionary stages is not detrimental when, at each stage, an official decision can be made which may remove the accused death-penalty consideration.

This court will not assume that prosecutors are motivated in their decisions to file charges by factors other than the strength of their case and the justification for a jury to impose the death penalty if it convicts. Defendant has presented no facts to show contrary motives. Moreover, the prosecutor is bound by the elements of each offense with which he determines to prosecute a defendant. The prosecutor simply initiates the process. The jury determines the guilt. Any discretion by the prosecutor to prosecute is similar to the discretion of a police officer to arrest. Absent evidence to the contrary, arbitrary and capricious behavior will not be assumed. Mistakes in judgment can be rectified by the criminal process including the trial and appellate stages. Accordingly, defendant's third assignment of error is not well-taken.

By his fourth assignment of error, defendant contends that the trial court committed prejudicial error by permitting the discriminatory use of peremptory challenges by the state without requiring the state to explain its reasons for use of each peremptory challenge of prospective black jurors.

In this case, the defendant is white, as were the victims and, apparently, the prosecutor and defense counsel. During voir dire of the jury, the state utilized seven of ten peremptory challenges to excuse

prospective jurors who were black. Defendant utilized nine peremptory challenges, and the record does not reveal how many, if any, of the jurors excused peremptorily by defendant were black. Likewise, the record does not indicate the number of jurors who were actually seated and heard the case who were black, if any. Nevertheless, defendant objected individually to each peremptory challenge of a black juror by the state, starting with the first peremptory challenge used by the state and ending with the last. The trial court overruled defendant's objections. Likewise, the trial court refused to require the state to explain its reasons for each of the peremptory challenges of a prospective juror who allegedly was black. Actually, the record does not directly reflect the race of the prospective jurors, but in raising the objection defense counsel stated the challenged juror was black without objection or correction either from the prosecutor or the court.

In support of his contentions, defendant relies primarily upon three decisions of the United States Supreme Court, namely, Peters v. Kiff (1972), 407 U.S. 493, 92 S.Ct. 2163; Taylor v. Louisiana (1975), 419 U.S. 522, 95 S.Ct. 692, and Batson v. Kentucky (1986), 476 U.S. 79, 106 S.Ct. 1712, which overruled Swain v. Alabama (1965), 380 U.S. 202, 85 S.Ct. 824. Defendant's reliance upon these three cases is misplaced, even though they could be stretched, extended, and expanded to support defendant's contention, if some of the determinative language in Batson is ignored. Peters involved a challenge by a white defendant to the exclusion of blacks from jury service. There is language in one opinion in that case at 2165, stating:

> "*** [I]n this case the principles governing the two claims are identical. First, it appears that

> the same selection process was used for both the grand jury and the petit jury. Consequently, the question whether jurors were in fact excluded on the basis of race will be answered the same way for both tribunals. ****

The opinion further states at 2168-2169:

> "If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> "But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases. ***
>
> "***
>
> "Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. ****

The foregoing opinion excerpts, however, were concurred in by only three justices of the United States Supreme Court and, therefore, do not constitute the opinion of the United States Supreme Court, much less binding authority upon the issues. Three additional justices concurred in the judgment but only with respect to the exclusion of blacks from grand jury service. These three justices stated in part at 2170, quoting from Hill v. Texas (1942), 316 U.S. 400, 62 S.Ct. 1159, at 406:

> "Thus, 'no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid . . . . [I]t is our duty as well as the States to see to it that throughout the procedure for bringing him to justice he shall enjoy the

> protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained.'"

The concurring justice's opinion continues at 2170, stating:

> "It is true that the defendant in Hill was a Negro, and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the excluded class. *** For me, however, the rationale and operative language of Hill v. Texas suggest a broader sweep; and I would implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. ***"

The three justices did not discuss the exclusion of blacks from petit jury service, and presumably rejected the plurality opinion, including both exclusions as a predicate for reversal, in light of the concurring opinion. More importantly, Peters involved adoption of a system for jury selection which automatically excluded blacks from jury service, whether challenged or not, by a selection method which invariably resulted in all prospective jurors selected for a venire being white. The three dissenting justices specifically rejected the concept that a white defendant who is not prejudiced by exclusion of blacks from a jury has no standing to mount a post-conviction attack upon the ground that a discriminatory jury selection has taken place in the past. Accordingly, both because of the issues determined, and because of the somewhat confused state of the decision, Peters offers no basis for a determination of the issue herein,

there being no clear majority decision and the issue before us being neither addressed nor determined in that case.

Taylor, supra, likewise involved a jury venire selection process under which a class was systematically excluded from service, in this case women. Thus, the Supreme Court stated at 695:

> "The Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury service. In this case, no women were on the venire from which the petit jury was drawn. The issue we have, therefore, is whether a jury-selection system which operates to exclude from jury service an identifiable class of citizens constituting 53% of the eligible jurors in the community comports with the Sixth and Fourteenth Amendments."

Quite clearly, the Supreme Court answered that question in the negative. Relying solely upon Peters, supra, the Supreme Court continued at 695:

> "The State first insists that Taylor, a male, has no standing to object to the exclusion of women from his jury. But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service. ***"

The court did not discuss the prejudicial-error rule, which was a predicate for the dissent, nor did the court find the exclusion to be per se prejudicial. Nevertheless, the court did limit its determination to the process by which a jury venire is selected and did not address the use of peremptory challenges by the prosecution.

The use of peremptory challenges to exclude all blacks from sitting on a particular jury for discriminatory reasons was discussed and determined in Batson, supra, with the opinion commencing at 1714, as follows:

> "This case requires us to reexamine that portion of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."

Swain, supra, had held that a court must first determine whether a black defendant was denied equal protection to the state's exercise of peremptory challenges to exclude all members of his race from a petit jury. At 1718 to 1719 of the Batson opinion, it is stated that:

> "Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome,' of the case to be tried *** the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

The question before the court was also whether a defendant had a burden to prove purposeful discrimination on the part of the state, before any explanation by the state need be forthcoming. Under Swain, proof of repeated striking of blacks over a number of cases was necessary to establish an Equal Protection Clause violation. In Batson, however, the Supreme Court concluded at 1722-1723:

> "The standards for assessing a prima facie case in the context of discriminatory selection of the venire has been fully articulated ***. These principles support our conclusion that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's excercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must first show that he is a member of a cognizable racial group, Castanedo v. Partida, supra, [(1977), 430 U.S. 482, 97 S.Ct. 1272], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *** Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Contrary to defendant's contention, it is only when such a necessary inference of purposeful discrimination has been established that the state is required to explain or justify its use of peremptory challenges of prospective black jurors. Thus, the Supreme Court continued at 1723 of Batson:

> "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. ***"

> "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. *** But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of defendant's race on the assumption--or his intuitive judgment--that they will be partial to the defendant because of their shared race. ***"

As clearly and unequivocally stated in Batson, the defendant must first show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Here, defendant complains not of removing jurors of his race by prosecutorial use of peremptory challenges but, instead, complains because members of another race were excluded. Defendant has completely failed to meet the first test of Batson. We find no reason to extend Batson to include an automatic contention of denial of equal protection or some other constitutional claim by a white defendant because of the use of peremptory challenges by a prosecutor to exclude black members from the jury. In addition, although the evidence indicates that seven of the ten peremptory challenges used by the prosecutor involve black jurors, there is nothing in the record to indicate that all prospective black jurors were excluded from the jury. In other words, there is nothing in the record of this case to indicate that the jury which tried and convicted defendant did not include blacks, or even a proportionate number of blacks. Accordingly, for that reason alone, this case is distinguished from Peters, Taylor, and Batson, in which cases no members of the affected minority served on the jury which tried and convicted the defendant. Even assuming there be some basis or predicate

for a claim by a white defendant that he is prejudiced by the exclusion of blacks from a jury, it is at least incumbent upon such white defendant to demonstrate that the jury which tried and convicted him included no blacks, especially where, as here, no blacks were connected with the trial, except possibly those who served on the jury, if any.

We are cognizant that defendant also relies upon an Arizona decision permitting a white defendant to raise the issue of discriminatory exclusion of blacks from his jury by the prosecutorial use of peremptory challenges, resulting in a jury including no blacks. However, in that case, although the defendant was white, his defense attorney was black.

Defendant also relies upon Stanley v. State (Md. 1988), 542 A.2d 1267, a case involving black defendants "convicted at trial by substantially or totally white jurors after most or all potential jurors who are black were excluded from jury service by peremptory challenges used by a state prosecutor." In that case, the court did find the facts and requirements were met so as to shift the burden to the state to come forward with a neutral explanation for challenging the black jurors. The Maryland court held that the exclusion of even one black from the jury by use of peremptory challenge is presumptively discriminatory if it results in an all white jury in a case involving a black defendant.

The Stanley court also held that, where eight blacks were peremptorily challenged from the jury in a trial of a black defendant, there is a presumption of discriminatory prosecutorial use of peremptory challenges, even though there were three blacks on the final jury. It is somewhat difficult to understand the Stanley court presumption in light of the fact that the final jury (presumably twelve members) included three

blacks, or twenty-five percent, and the original venire included less than twenty-five percent blacks. In other words, where the end result is that the percentage of blacks on the jury is equal to the percentage of blacks in the venire, it is difficult to presume improper discrimination on the part of the prosecution. Neither a white nor black defendant is entitled to a jury of a particular race. Here, defendant used nine peremptory challenges to exclude prospective members of the jury. If all of those were white, which does not appear from the record, then we have a situation where peremptory challenges were used to exclude twelve whites and seven blacks from the jury, resulting in a jury of an unknown racial mix. Any discriminatory purpose is mitigated by the fact that the victims, the defendant, and all other trial participants, with the possible exception of some of the jurors, are white.

Even assuming that there may be circumstances under which a white defendant may be prejudiced by the exclusion of blacks from his jury by prosecutorial use of peremptory challenges of blacks, this has not been demonstrated to be such a case. Under Batson, the threshhold showing must be that the members of the defendant's race have been excluded from jury service. There is no such showing here. At the very minimum, for a white defendant to raise the issue of the use of prosecutorial peremptory challenges to exclude blacks, such white defendant must demonstrate prejudice to him resulting from such exclusion and must demonstrate that the resultant jury included no blacks, or at least a substantially disproportionate number of blacks.

Where the members of the defendant's race have not been excluded from jury service by the use of peremptory challenges by the

prosecution, the prosecution need not explain its use of peremptory challenges to exclude the members of another race from the jury, in the absence of a demonstration by the defendant that such exclusion was systematic and results in prejudice to the defendant or, in effect, denies him a fair trial. The Batson rule is slightly different if members of the defendant's race are systematically excluded by the prosecution by use of peremptory challenges.

Accordingly, defendant has not met the threshhold conditions necessary to require the state to explain its use of peremptory challenges, and the fourth assignment of error is not well-taken.

By his fifth assignment of error, defendant contends that the trial court admitted irrelevant hearsay testimony. Specifically, defendant argues that two statements in the testimony of a police officer were both irrelevant and hearsay. The testimony centered around actions of defendant's brother and sister when the police arrived to impound defendant's vehicle. Such statements of defendant's siblings were obviously hearsay. The officer testified that defendant's brothers stated, "You have no right being here on the property," and "We already cleaned it [the vehicle] out, you're too late" (Tr. XIII, 433-435).

The state concedes that these two statements were hearsay and that defendant timely objected. However, the state further contends that the improper admission of this hearsay testimony was not prejudicial in this case. We agree that defendant has not demonstrated that the error was prejudicial.

We agree also with defendant's contention that the evidence was irrelevant. In fact, the evidence is so irrelevant that it has no

probative value in this case, and we are at a loss to understand how it prejudiced defendant since it would be clear to the jury that the evidence had no bearing upon defendant's guilt or innocence. Defendant does contend that somehow this evidence would indicate that defendant's family were people who purposely obstruct police business and would constitute an implication that the family was trying to hide evidence of criminal conduct. We find no basis for such an inference in the record. As to the sister's conduct, the testimony indicates that she removed a black purse and a brown paper bag from the vehicle. The only inference from this conduct was that she was attempting to retrieve her own personal property from the vehicle before it was impounded by the police. There is no evidence nor suggestion that either the purse or bag contained anything pertaining to defendant himself. Again, although the testimony may have been irrelevant, we find no prejudice. Since defendant has not demonstrated the error to be prejudicial, the fifth assignment of error is not well-taken.

By the sixth assignment of error, defendant contends that the trial court erred in allowing the state witness, Dorothy Twiss, to testify because such testimony was irrelevant. Twiss was the sister of one of the victims. She merely testified that that victim had obtained a new job and was celebrating his employment, meaning his visit to the home of the other victim. Although defendant did object before direct examination of Twiss as to testimony concerning the character of her brother, no such testimony was forthcoming. Defendant did not object during direct examination to her testimony concerning the victim's obtaining employment and celebration thereof. The state contends that the evidence as to the reason for the

victim's presence in the basement on the evening in question tends to negate defendant's defense of self-defense. Under the circumstances, defendant has not demonstrated error, has not demonstrated an objection, and has not demonstrated prejudice. The sixth assignment of error is not well-taken.

By the seventh assignment of error, defendant contends that the judgment should be reversed because of prosecutorial misconduct during closing argument. The state contends there was no prosecutorial misconduct and that the statements made by the prosecution were proper and were invited by defense counsel's closing argument. Basically, we find none of these contentions of the parties to be correct. The comment of the prosecutor was first that the prosecution was not required to prove motive and could not in this case prove motive. Then, to enhance the chance that the jury would find prior calculation and design, the prosecutor asked the jury to speculate as to motive by reference to some essentially irrelevant evidence adduced at trial through cross-examination of defendant. The prosecutor bragged in his closing argument to the jury that he "set the defendant up" and "elicited that testimony." (Tr. XIII-837.) The prosecutor continued on this irrelevant vein as to how defendant did not volunteer testimony of having been at a friend's house before he went to the bar where he met victim Golden and was introduced to victim Kicas. This meeting led to their going to Golden's home where the shooting occurred hours later.

The prosecutor commented essentially as follows (Tr. XIII, 836):

"*** Because no finder of fact, no jury, including you ladies and gentlemen, is going to go back there and start discussing about what happened regarding two dead men and not wonder about why it happened. Of course, you want to know why it happened. You don't kill two men for no reason.

"So the issue of motive is important, and because it is important, Mr. Moore and I brought you some evidence of motive. We did not prove motive to you because we cannot prove to you what was going on in the Defendant's mind when the shots were fired. But we brought you some evidence of motive because you would want to know and we want you to know what we do about motive.

"Now, you will be instructed, and its on page 6 of your instructions, that proof of motive by the State is not required. You know that, you know that from voir dire.

"The evidence that Mr. Moore and I presented to you regarding the issue of motive--and I'm only talk [sic] about motive, I'm not talking about prior calculation and design--the evidence that we presented to you regarding motive is as follows: Nancy Wellman and the first victim, Gary Golden, had an affair some seven months before the shooting. The defendant and Nancy Wellman's husband, Bud, were good friends for many years. We know that Bud Wellman helped the Defendant financially in the past several times.

"We know that the Defendant visited the home of Bud Wellman and talked to Bud Wellman approximately one hour before he went to Bernhards. Maybe it was an hour and 15 minutes, maybe, it was an hour and a half, but he said 8:00 p.m., he knows that he got to Bernhards about 9:00 p.m.

"I want you to think about that fact for a minute. It's awfully important to me. ***"

There is not even a scintilla of evidence suggesting that Wellman hired defendant to kill Golden. Likewise, there is not even a scintilla of evidence that defendant killed Golden because Golden had had an affair with defendant's friend's wife some months before. These innuendos are a figment of the prosecutor's imagination. Not even he

directly made such statements but, instead, insinuated the result by his references to this testimony as being evidence of motive, which it is not. The prosecution is not required to prove motive, and it is improper for the prosecutor to comment upon motive or evidence of motive unless there is some evidence of the motive (for the alleged act of the defendant). The only other evidence bearing upon the prosecutor's improper comment was the statement of the surviving victim before the shooting when asked to put the gun away, that defendant stated, "Maybe I'm a hit man." Unfortunately, the prosecutor by his last comment did inject his personal opinion or feelings into his argument, stating the testimony "was very important to him." Furthermore, the prosecutor asked the jury to speculate as to motive, since there was no reasonable inference from the evidence adduced as to defendant's motive. The evidence created at most a possibility of a reason for defendant's killing the two men but did not rise to the level where reasonable inference could be made that such a motive existed.

The prosecutor further contends that he was merely responding to comments of defense counsel during closing argument and, therefore, was justified. Defense counsel's comment was a prediction as to what the prosecutor would argue during the final portion of the prosecutor's argument, the comment upon motive not having been made during the first portion of the argument. Defense counsel suggested that the prosecutor planned to raise this issue in the last portion of his argument when there could be no response from defense counsel. Defense counsel apparently responded in anticipation that the argument would be made by the prosecutor.

Such types of gamesmanship are reprehensible. As defendant contends, the argument was improper because there was no evidence from which a reasonable inference could be made as to motive, the prosecutorial comments being mere speculation unsupported by evidence. The proper course for defendant would be under these circumstances to object to the improper argument and have the trial court admonish the jury to disregard it and instruct the jury that there is no evidence of motive. Defense counsel did not do so.

The alternative course available to defense counsel, if the prosecutor persists in making important portions of his closing argument for the first time in his final argument, is to request from the trial court an opportunity to respond to such new argument. It would be an abuse of discretion on the part of the trial court to deny defense counsel an opportunity to respond to argument essential to the determination made by the prosecutor for the first time in the final portion of his argument. The alternative course for the trial court is to instruct the jury to disregard the prosecutor's argument and admonish the prosecutor.

Trial by combat has long since been abolished. Counsel are not champions engaged in combat to determine which one may outsmart the other or outfight the other and, thus, "win" for his client. Trials are a serious business, especially criminal murder trials, and all actions of counsel and the trial court should be to assure that justice is served in a proper manner within the rules of conduct.

Nevertheless, considering the totality of the circumstances involved, we do not find the prosecutorial misconduct to be so egregious as to require court interference or as to constitute plain error. There was

no objection by defense counsel who, instead, anticipated the prosecutor's argument and commented upon it during defense counsel's closing argument, rather than waiting to object thereto. It would appear, therefore, at that time that defense counsel assumed the argument was proper and not objectionable, or because of trial strategy felt it was better to have the prosecutor make this evidentially unsupported argument in hopes that the jury would be perceptive enough to recognize the lack of evidentiary support for the prosecutor's argument and, accordingly, question all parts of the prosecutor's argument because of this speculation on the part of the prosecutor.

In light of the jury verdict, it is more probable that the jury recognized the impropriety of the prosecutor's argument speculating as to motive for the killing of Golden, which may have contributed to the jury's finding defendant not guilty of aggravated murder as to Golden but guilty of murder. In any event, the prosecutor's attempt to bolster his case by the improper argument failed. The jury found defendant not guilty of aggravated murder with respect to the victim Golden as to whom the prosecutor speculated there was a motive either for murder for hire or for revenge. The jury didn't "buy" the speculation of the prosecutor so that for practical purposes it had no effect upon the verdict. Since defense counsel did not object, the improper comment is not so egregious as to require court intervention or to be plain error, and the jury rejected the prosecutor's speculation, there is no prejudicial error, and the seventh assignment of error is not well-taken.

By the eighth assignment of error, defendant contends that he was denied effective assistance of counsel because defense counsel failed

to object to the improper prosecutorial argument which is the subject of the seventh assignment of error. However, as noted above, this may have been trial strategy since defense counsel anticipated the prosecutorial argument during defense counsel's closing argument. The jury accepted defense counsel's anticipatory argument rather than the speculation by the prosecutor. In short, if that were the trial strategy of defense counsel, it was successful. In any event, there is no indication of ineffective assistance of counsel, and the eighth assignment of error is not well-taken.

For the foregoing reasons, all eight assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McCORMAC and YOUNG, JJ., concur.

---

(5)

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	85CR 08-2218
Plaintiff-Appellee,	:	
v.	:	No. 87AP-526
Larry Joe Powers,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on December 13, 1988, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, P. J., McCORMAC & YOUNG, JJ.

By _____
Judge Orpha L. Whiteside, P. J.

cc: Patrick E. Sheeran
Robert L. Lane and
Jerry L. McHenry

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION 07151 B01

State of Ohio,	:	
Plaintiff,	:	January Term, 1986
vs.	:	Case No. : 85CR-08-2218
Larry Joe Powers,	:	Judge Fais
Defendant.	:	Indictment for: Aggravated Murder with specifications (R.C. 2903.01)(A/F-1)(2 counts); Attempted Aggravated Murder with specification (R.C. 2923.02 and 2903.01)(1 count)(Total 3 counts)

FILED
1987 MAY -6 PM 1:36

ENTRY

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 5, 1987.

This day, May 5, 1987, again came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in Court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Samuel B. Shamansky and Terry K. Sherman.

Thereupon being informed of the verdict of the Jury, GUILTY of the lesser included offense of Murder with a firearm specification, a violation of Section 2903.02 with respect to count one; and GUILTY of Aggravated Murder and GUILTY of specifications one, two and the firearm specification, violations of Section 2903.01 and 2929.04(A)(5) and (A)(3) of the Ohio Revised Code with respect to count two; and GUILTY of Attempted Aggravated Murder with a firearm specification, a violation of Section 2923.02 and 2903.01 of the Ohio Revised Code, as to count three.

7053

22

The Court afforded counsel an opportunity to speak in behalf of the defendant and addressed the defendant personally affording him an 07151 B02
opportunity to make a statement in his own behalf.

The Court and Jury having considered all matters required by Sections 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code; it is the sentence of the Court that the defendant pay the costs of this prosecution and serve a period of an indefinite term of fifteen (15) years to Life as to count one. As to count two with specifications one and two the defendant is to serve an indefinite term of Life imprisonment with parole eligibility after serving thirty (30) years of imprisonment. As to specification three of count two, the defendant is to serve a period of three (3) years actual incarceration , to be served consecutive to the sentence in count two. As to count three, the defendant is to serve an indefinite term of five (5) years to twenty-five (25) years.

The sentences in count one, two and three are all to be run consecutive to each other and to the three years actual incarceration; therefore, defendant's total sentence is fifty-three (53) years to Life. Confinement is the Chillicothe Correction and Reception Center and the defendant is to receive six hundred forty-one (641) days of jail time credit toward his sentence. The defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution, from the date of imposition of sentence.

FILED
1987 MAY -6 PM 1:36

G. W. Fais, Judge
Court of Common Pleas
Franklin County, Ohio

Jury Costs $
Costs $
Total Costs $

IGRC 15y-life/life + 3y actual
5-25y CCRC cst

7054

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(Effective 1791)

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(Effective 1868)

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2923.02 Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, in retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, of complicity in the commission of such offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit an aggravated felony of the third degree is a felony of the fourth degree. An attempt to commit any other offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

HISTORY: 134 v H 511 (Eff 1-1-74); 140 v S 319 (Eff 7-1-83); 140 v H 681, Eff 10-1-84.

Not analogous to former RC § 2923.01 (CC §§ 12819-1, 12819-2; 105 v 124; Bureau of Code Revision, 10-1-53), repealed 134 v H 511, § 2, Eff 1-1-74.

§ 243. Exclusion of jurors on account of race or color

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

(June 25, 1948, ch 645, § 1, 62 Stat. 696.)

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

AFFIDAVIT OF COUNSEL

STATE OF OHIO)
SS:
COUNTY OF FRANKLIN)

I, Robert L. Lane, being first duly sworn according to law state:

1. I am counsel of record for petitioner in the above-styled case.

2. I personally deposited ten (10) copies of the Petition for Writ of Certiorari to the Court of Appeals of Franklin County, Ohio in the above-styled case in a United States mailbox, with first-class postage prepaid, addressed to the Clerk of this Court, on June 30th, 1989.

3. Therefore, to my knowledge said Petition for Writ of Certiorari was mailed to this Court on June 30th, 1989, within the time allowed for filing such Petition.

ROBERT L. LANE
Counsel for Petitioner

Sworn to and subscribed in my presence this 30th day of June, 1989.

NOTARY PUBLIC

Gregory L. Ayers, Attorney At Law
Notary Public - State of Ohio
My Commission Has No Expiration Date
Section 147.03 R.C.

OPPOSITION

BRIEF

ORIGINAL

NO. 89-5011

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

S. MICHAEL MILLER
Prosecuting Attorney

ALAN C. TRAVIS
Counsel of Record

Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
614-462-3555

Counsel for Respondent

QUESTIONS PRESENTED

I. SHOULD THIS COURT DECIDE A QUESTION NOT ADEQUATELY RAISED OR PRESERVED IN STATE COURTS OR WHERE THE RECORD IS INSUFFICIENT TO DECIDE THE QUESTION PRESENTED?

II. IN A CRIMINAL CASE, DOES A DEFENDANT OF ONE RACE HAVE STANDING TO CHALLENGE THE REMOVAL BY PEREMPTORY CHALLENGE OF MEMBERS OF ANOTHER COGNIZABLE RACIAL GROUP?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 89-5011

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

LARRY JOE POWERS,

Petitioner

v.

STATE OF OHIO,

Respondent.

The respondent respectfully submits that the Writ of Certiorari should not issue in this case.

OPINIONS BELOW

The opinions of the Ohio Supreme Court and the Ohio Court of Appeals for the Tenth Appellate District are adequately set forth in the petition.

JURISDICTION

Jurisdiction is claimed by petitioner under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS

The Sixth and Fourteenth Amendments are adequately set forth in the petition.

STATEMENT OF THE CASE

Petitioner was charged by indictment with two counts of aggravated murder in the slayings of Gary Golden and Thomas Kicas. Petitioner was charged with a third count of attempted aggravated murder in his unsuccessful attempt to murder Golden's former-wife, Charlotte. Charlotte Golden survived and testified at petitioner's trial. Petitioner and both decedents met at a local tavern in Columbus, Ohio, then returned to the home of Gary and Charlotte Golden. Petitioner produced a pistol. When asked why he had the gun, petitioner said: "Maybe I am a hit man." When he was asked to put the gun away, petitioner shot and killed Gary Golden. Petitioner then turned to Kicas, said: "You're dead" and fatally shot him. Petitioner addressed Charlotte Golden, stating: "Bitch, you are dead." Petitioner then fired

several shots at Charlotte Golden as she fled from the home. Petitioner admitted killing Golden but claimed he did so in self-defense. Petitioner said he shot Kicas because he did not know what Kicas would do after petitioner killed Golden. Petitioner denied shooting at Charlotte Golden.

During jury selection, petitioner objected when the state exercised some of its peremptory challenges to remove some black veniremen from the jury. The objections were overruled. Petitioner peremptorily removed at least one black juror. Petitioner did not object to the composition of the final panel. Petitioner expressed satisfaction with the jury as composed. Petitioner was convicted of all charges. On appeal, the Ohio Court of Appeals held that whether or not a defendant of one race has standing to challenge the removal of jurors of another race, petitioner had failed to demonstrate on the record the racial composition of the jury which convicted him. The state court found that the record on appeal was silent as to the final racial composition of the jury and "for that reason alone", petitioner's case was distinguishable from Batson v. Kentucky, 476 U.S. 79, (1986) and other decisions of this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE QUESTION PRESENTED WAS NOT ADEQUATELY RAISED AND PRESERVED IN THE LOWER COURTS.

Petitioner did not adequately raise and preserve in the state courts the issue of whether the petit jury which convicted him was improperly selected. [1] As found by the state appellate court, the record failed to indicate the racial composition of the jury panel and "for that reason alone", the case was distinguishable from Batson and earlier decisions of this Court. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976). Petitioner's case is not the exceptional one in which the Court should relax that rule.

II. THE RECORD IS INADEQUATE TO DETERMINE THE QUESTION PRESENTED.

Petitioner did not preserve the record on the issue he seeks to litigate. Petitioner not only failed to object to the panel as chosen but affirmatively expressed his satisfaction with the jury as selected. [2] The record does not indicate the final racial composition of the empaneled jury. If the record is not sufficient to show a clear right to relief or if the record is not adequate for determination of the issues presented both by petitioner and respondent, then plenary review should not be granted. "While this Court decides questions of public importance, it decides them in the context of meaningful litigation." The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959). The record contains neither evidence nor findings of the racial make-up of the petit jury which convicted petitioner. See Mishkin v. New York, 383 U.S. 502 (1965). On the state of the record, any decision in this case would be in the abstract.

---

[1] Petitioner makes no claim that the process of selecting the venire was improper.

[2] After fourteen days of jury selection, petitioner stated to the trial court: "We are satisfied with our jury."

III. PETITIONER LACKS STANDING TO CHALLENGE THE REMOVAL OF PROSPECTIVE JURORS OF OTHER THAN HIS RACE.

Petitioner, who is white, has no standing to challenge the peremptory removal of jurors of other than his race.

> "To establish such a case, the defendant first must show that he is a member of a cognizable racial group. . . (citation omitted). . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Batson v. Kentucky, supra. 476 U.S. 79, (1986), 106 S. Ct. at 1723.

Petitioner lacks standing to challenge the selection process on the grounds he urges. See United States v. Vaccaro, 816 F 2d 443 (C.A. 9, 1987). Moreover, petitioner cannot assert the general right of black citizens to be a part of the judicial process. A litigant may not vicariously assert the constitutional rights of others. e.g., United States v. Salvucci, 444 U.S. 83 at 86-87 (1980). Certiorari should not issue on the question presented.

CONCLUSION

Petitioner did not adequately raise or preserve the question presented, Petitioner did not object to but rather expressed satisfaction with the petit jury as empaneled. The record does not reflect the racial composition of the jury which convicted petitioner. Certiorari should not issue to decide only an abstract question of law. Even were the record sufficient to determine the question, petitioner lacks standing to challenge the exercise of peremptory removal of jurors of other than petitioner's race.

For the reasons advanced in the foregoing brief of respondent, it is respectfully submitted that the Writ of Certiorari should not issue in this case.

Respectfully submitted,

MICHAEL MILLER
Prosecuting Attorney

ALAN C. TRAVIS
Assistant Prosecuting Attorney
Counsel of Record

369 South High Street
Columbus, Ohio 43215
614-462-3555

CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the rules of practice of this Court, the undersigned, a member of the bar of this Court, certifies that a copy of the foregoing Brief of Respondent has been served upon petitioner, Larry Joe Powers, by mailing a copy to the office of petitioner's counsel of record, Robert L. Lane, State Public Defender's Office, Eight East Long Street, Eleventh Floor, Columbus, Ohio 43215, by United States Mail, First Class, postage prepaid, this 24th day of July 1989.

I further certify that all parties required to be served, have been served.

Alan C Travis

ALAN C. TRAVIS
Counsel for Respondent

Counsel of Record

JOINT

APPENDIX

No. 89-5011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY JOE POWERS,

Petitioner,

v.

OHIO

On Writ Of Certiorari To The Tenth District Court Of Appeals, Franklin County, Ohio

---

JOINT APPENDIX

RANDALL M. DANA
Ohio Public Defender
ROBERT L. LANE*
Chief Appellate Counsel
GREGORY L. AYERS
Chief Counsel
JILL E. STONE
Assistant State Public Defender
Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: (614) 466-5394
Counsel for Petitioner
**Counsel of Record*

S. MICHAEL MILLER
Prosecuting Attorney
ALAN C. TRAVIS*
Assistant Prosecuting Attorney
Hall of Justice
369 South High Street
Columbus, Ohio 43215
Telephone: (614) 462-3555
Counsel for Respondent

PETITION FOR CERTIORARI FILED JUNE 30, 1989
CERTIORARI GRANTED FEBRUARY 20, 1990

47pp

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

FRANKLIN COUNTY COURT OF COMMON PLEAS

August 8, 1985	Indictment filed.
May 6, 1987	Conviction Entry filed.

TENTH DISTRICT COURT OF APPEALS,
FRANKLIN COUNTY, OHIO

December 13, 1988	Journal Entry of Judgment filed.
December 13, 1988	Opinion filed.

SUPREME COURT OF OHIO

April 5, 1989	Judgment Entry filed.
May 3, 1989	Rehearing Entry filed.

THE STATE OF OHIO
FRANKLIN COUNTY

Case No. 85CR-08-2218

INDICTMENT FOR: Aggravated Murder with Specifications * (2903.01 R.C.) (2 counts) and Attempted Aggravated Murder with Specification (2923.02 and 2903.01 R.C.) (1 count) (Total 3 counts)

FILED: AUG 8, 1985

In the Court of Common Pleas, Franklin County, Ohio, of the Grand Jury Term beginning May third in the year of our Lord, one thousand nine hundred and eighty-five.

Count One

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and by the authority of the State of Ohio upon their oath do find and present that *Larry Joe Powers* late of said County, on or about the twenty-seventh day of July in the year of our Lord, one thousand nine hundred and eighty-five within the County of Franklin aforesaid, in violation of section 2903.01 of the Ohio Revised Code, did purposely, and with prior calculation and design cause the death of another, to wit: Gary Golden and in compliance with section 2941.14 of the Ohio Revised Code, the Grand Jurors further find *FIRST SPECIFICATION TO THE FIRST COUNT*, under section 2929.04(A)(5) of the Ohio Revised Code, that the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender, *SECOND SPECIFICATION TO THE FIRST COUNT*, the Grand Jurors further find and specify that the said Larry Joe Powers had a firearm, as defined in section 2923.11 of the Ohio Revised

Code, on or about his person or under his control while committing the said Aggravated Murder,

Count Two

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and by the authority of the State of Ohio upon their oath do find and present that *Larry Joe Powers* late of said County, on or about the twenty-seventh day of July in the year of our Lord, one thousand nine hundred and eighty-five within the County of Franklin aforesaid, in violation of section 2903.01 of the Ohio Revised Code, did purposely, and with prior calculation and design cause the death of another, to wit: Thomas Kicas, and in compliance with section 2941.14 of the Ohio Revised Code, the Grand Jurors further find *FIRST SPECIFICATION TO THE SECOND COUNT*, under section 2929.04(A)(5) of the Ohio Revised Code, that the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender, and in compliance with section 2941.14 of the Ohio Revised Code, the Grand Jurors further find *SECOND SPECIFICATION TO THE SECOND COUNT*, under section 2929.04 (A)(3) of the Ohio Revised Code, that the offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender, to wit: Aggravated Murder, *THIRD SPECIFICATION TO THE SECOND COUNT*, the Grand Jurors further find and specify that the said Larry Joe Powers had a firearm, as defined in section 2923.11 of the Ohio Revised Code, on or about his person or under his control while committing the said Aggravated Murder.

Count Three

The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and by the authority of the State of Ohio upon their oath do find and present that *Larry Joe Powers* late of said County, on or about the twenty-seventh day of July in the year of our Lord, one thousand nine hundred and eighty-five within the County of Franklin aforesaid, in violation of section 2923.02, Ohio Revised Code, did purposely engage in conduct which, if successful, would have constituted or resulted in the offense of Aggravated Murder a violation of section 2903.01 of the Ohio Revised Code, in that the said Larry Joe Powers attempted to, purposely, and with prior calculation and design cause the death of another, to wit: Charlotte Golden

SPECIFICATION TO THE THIRD COUNT, the Grand Jurors further find and specify that the said Larry Joe Powers had a firearm, as defined in section 2923.11 of the Ohio Revised Code, on or about his person or under his control while committing the said Attempted Aggravated Murder, contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio.

MICHAEL MILLER
Prosecuting Attorney
Franklin County, Ohio

A TRUE BILL

/s/ WILLIAM A. REDDINGTON
Assistant Prosecuting Attorney RED06

/s/ DONALD W. GORBETT
Foreperson, Grand Jury

STATE v. POWERS
COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

Case No. 85 CR-08-2218

* * *

[Vol. 5 907] MR. MORGAN: Your Honor, my understanding is that we presently have a jury of twelve potential jurors. The court having asked the State if it has any peremptory challenges, and the State does. For its first peremptory challenge, the State would challenge juror number 2, Norma Wooden.

MR. SHERMAN: Well, Your Honor, I want to let the record reflect that Mrs. Wooden is black. Basically on the basis of the Supreme Court's latest decision, that the State is required before they start excluding people of minority races, that they state their reasons on the record.

So we are going to object to that until and unless they put something on the record as to why they are excluding Miss Wooden.

MR. MORGAN: Your Honor, that's not my understanding of the law, and the State takes the position that since a record has been made the record is clear as to statements made by all potential jurors, and peremptory challenge, the State is not going to and feels it does not have to make any statements as to why any juror is being exercised on peremptory challenge. That's our position.

[Vol. 5 908] THE COURT: Thank you. Do you want a ruling?

MR. SHERMAN: Going to need one.

THE COURT: No explanation at this time.

* * *

[Vol. 6 1220] THE COURT: Mr. Moore, did you exercise your peremptory challenge?

MR. MORGAN: Not yet. The State does have a peremptory challenge, thank you. The State would—is prepared to proceed at this time.

Your Honor, at this time for the State's third peremptory challenge, the State would challenge juror number one, Maurice Eckels.

MR. SHERMAN: Your Honor, I want to like the record to reflect Mr. Eckels is black, and we are requesting pursuant to the latest dictates of the United States Supreme Court that it's incumbent upon the prosecution when they are challenging minority groups to state on the record as to what the reason for the challenge is so a determination can be made that it's something other than racial.

MR. MORGAN: That is not the law, Your Honor, and the State feels it is not—

THE COURT: The record is made. Overruled.

* * *

[Vol 6. 1374] THE COURT: Mr. Morgan, does the State of Ohio wish to enter peremptory challenge No. 4?

MR. MORGAN: Yes, Your Honor. The State does wish to do so. For its fourth peremptory challenge, Your Honor, the State would ask that the Court excuse potential juror No. 1, Alexis Daniels.

MR. SHERMAN: May it please the Court, I just want the record to reflect—Excuse us, we have to make a record here.

Your Honor, juror number 1 is—potential juror number 1 is black and we are going to voice the same objection we have been.

We would like to point out of the four challenges that the State has used, they excluded three blacks.

THE COURT: Thank you.

MR. MORGAN: Thank you, Your Honor.

THE COURT: Objection is noted and overruled.

MR. SHERMAN: Again, I'm asking they state on the record why.

THE COURT: Well, sure. Ready?

MR. SHERMAN: I want to make it clear we [Vol 6 1375] are again requesting they state on the record exactly why they excused Miss Daniels.

THE COURT: You may.

MR. SHERMAN: We are making that request. That's what we are asking.

THE COURT: Do you want to state for the record right now?

MR. SHERMAN: We have, that we oppose their challenge for cause. Not challenge for cause, that we oppose their peremptory challenge, they haven't stated on the record why they are excluding her.

This is the third black in four challenges that they have excluded. We have a right to have a trial by all members of the community. I think what they are doing, they are trying to exclude all the blacks.

THE COURT: Mr. Morgan, do you want to express an opinion?

MR. MORGAN: No, Your Honor. The State feels it's not necessary at this time. The record is clear.

THE COURT: Objection is overruled.

* * *

[Vol. 6 1549] THE COURT: Peremptory challenge No. 5, Mr. Morgan.

MR. MORGAN: Yes, sir. Your Honor, the State does wish to make a peremptory challenge. For its fifth peremptory challenge the State would ask that juror number 5, Renee Page, be excused.

MR. SHERMAN: Your Honor, I want the record to reflect Miss Page is black.

MR. MORGAN: I'm not sure the record should reflect she's black. I'm not convinced she is. Do you have proof of that?

MR. SHERMAN: She appeared to me to be black. I'm going to renew any previous objection, and I'm going to point out 4 out of the 5 challenges [Vol. 6 1550] that have been exercised by the State have been against people who are black.

THE COURT: The record may so show. Overruled.

MR. SHERMAN: We oppose again, the Court allowed this peremptory without a reason on the record to indicate it's something other than race.

THE COURT: Mr. Morgan.

MR. MORGAN: Mr. Sherman has consistently brought up the fact that there is apparently something wrong with the State exercising peremptories against black jurors. Apparently seems to feel the United States Supreme Court has some thoughts on that.

I would like to read into the record the following cite. The case is Batson versus Kentucky cited 106 Supreme Court 1712, cited by the United States Supreme Court in 1986.

The Supreme Court states in that opinion at page 1722 and over onto page 1723, I will read into the record the following excerpt: "The standards for assessing a prima facie case in the context of discriminatory selection of the venire—" "—defendant may establish a prima facie case of purposeful discrimination in selection of the petit **[Vol. 6 1551]** jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group—" "—and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race."

Now, until the defense stipulates the Defendant is of the black race, or partially black, I don't understand what it is that Mr. Sherman is claiming. But I think the decision from the United States Supreme Court is clear that we have not been exercising peremptory challenges from the race of the Defendant.

In fact, the record should show the challenges made by the defense to date have all been white, and it's my understanding the race of Defendant is white. I do not see the objection. And I would like the record to reflect my thoughts on that.

We do not need to make any statement as to why we exercise the peremptories that we do, and we are aware of no case law that says that.

If Mr. Sherman has that I will appreciate him bringing it forward and we will act accordingly.

[Vol. 6 1552] THE COURT: Do you care to respond, Mr. Sherman?

MR. SHERMAN: Your Honor, my response is factually the defendant in the case Mr. Morgan cites was, in fact, black. But the way I read that case and other cases, and I'm not sure that case is limited to what Mr. Morgan is saying, because what that case does say is it's up to the prosecutor if he's to start perempting people solely on that basis he is obligated to put on the record exactly what he is doing and why.

In this case, five perempts were used by the State. Four of them were black. Larry Powers, whether he's black, white or indifferent, he has a right to have a jury of his peers, of people of this community of all cross sections, all races, all backgrounds. It's evident what they are doing, they are excluding all blacks.

The prosecution in this case is attempting to keep all blacks off this jury. If that isn't racial discrimination, then I don't know what it is, and he has as much right to have people from varied backgrounds decide this case as anybody, especially in a life and death case.

THE COURT: You made your record, Mr. **[Vol. 6 1553]** Sherman. Overruled.

* * *

[Vol. 7 196] THE COURT: All right. See my bailiff, the last door to the left.

Do you want to make a decision now, Mr. Morgan?

MR. MORGAN: One moment, but we can, yes.

I apologize for the delay, your Honor. Yes, your Honor, the state does wish to exercise an additional peremptory.

I believe for our seventh peremptory we would ask number six, Frances Jackson, be excused.

THE COURT: We will meet again at 9:00.

MR. SHERMAN: Your Honor, before we end, I just want to point out, well, I want to object to the use of that peremptory challenge. Again, Miss Jackson is black. I want to basically reiterate the same things that I have done before. I think you should sustain our objection unless and until Mr. Morgan or Mr. Moore put on the record reasons for excusing this juror.

I point out again out of seven peremptory challenge, at least five were black, or six..

MR. WEINER: Six.

[Vol. 7 197] MR. SHERMAN: Six out of seven were black.

MR. MORGAN: Five. Your Honor, I could read into the case Bates versus Kentucky. Again, the law is very clear in this matter.

THE COURT: Challenge will be sustained; objection is overruled. See you 9:00 Monday morning.

***

[Vol. 8 1982] MR. MORGAN: Your Honor, the State wishes to use its ninth peremptory challenge and challenge Mrs. Litzy, potential juror.

MR. SHERMAN: I think the record ought to reflect again, Mrs. Litzy is black. I'm going to renew my objections that I made earlier.

THE COURT: Thank you, Mr. Sherman. Your record is made.

***

[Vol. 8 2281] THE COURT: Thank you. That's all.

Peremptory challenge on behalf of the State, number 10.

MR. MORGAN: Please the Court, for the State of Ohio's tenth challenge, peremptory challenge, we would ask that juror number three, Larcenia Bosley be excused.

THE COURT: All right, thank you.

MR. SHERMAN: As long as we are on the record, I want to point out that juror number three, Mrs. Bosley, is black. I would raise the same objections that I've been raising all the way through. Point out 10 perempts, I think they have excluded 8 black people.

THE COURT: Thank you. Overruled.

****

[Vol. 9 94] THE COURT: CHALLENGE ON BEHALF OF THE DEFENDANT?

MR. SHERMAN: YOUR HONOR, WE ARE GOING TO PASS. WE ARE SATISFIED WITH OUR JURY.

***

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

January Term, 1986
Case No. 85CR-08-2218

[Caption omitted in printing]

JUDGE FAIS

INDICTMENT FOR: Aggravated Murder with Specifications (R.C. 2903.01) (A/F-1) (2 counts); Attempted Aggravated Murder with Specification (R.C. 2923.02 and 2903.01) (1 count) (Total 3 counts)

FILED: MAY 6, 1987

ENTRY

In the Court of Common Pleas for the County of Franklin, State of Ohio, during the term begun on January 5, 1987.

This day, May 5, 1987, again came the Prosecuting Attorney on behalf of the State of Ohio, the defendant being in Court in custody of the Sheriff and the Court being fully advised in the premises that the defendant was in Court and being represented by counsel, Samuel D. Weiner and Terry K. Sherman.

Thereupon being informed of the verdict of the Jury, GUILTY of the lesser included offense of Murder with a firearm specification, a violation of Section 2903.02 with respect to count one; and GUILTY of Aggravated Murder and GUILTY of specifications one, two and the firearm specification, violations of Section 2903.01 and 2929.04(A)(5) and (A)(3) of the Ohio Revised Code with respect to count two; and GUILTY of Attempted Aggravated Murder with a firearm specification, a violation of

Section 2923.02 and 2903.01 of the Ohio Revised Code, as to count three.

The Court afforded counsel an opportunity to speak in behalf of the defendant and addressed the defendant personally affording him an opportunity to make a statement in his own behalf.

The Court and Jury having considered all matters required by Sections 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code; it is the sentence of the Court that the defendant pay the costs of this prosecution and serve a period of an indefinite term of fifteen (15) years to Life as to count one. As to count two with specifications one and two the defendant is to serve an indefinite term of Life imprisonment with parole eligibility after serving thirty (30) years of imprisonment. As to specification three of count two, the defendant is to serve a period of three (3) years actual incarceration, to be served consecutive to the sentence in count two. As to count three, the defendant is to serve an indefinite term of five (5) years to twenty-five (25) years.

The sentences in count one, two and three are all to be run consecutive to each other and to the three years actual incarceration; therefore, defendant's total sentence is fifty-three (53) years to Life. Confinement is the Chillicothe Correction and Reception Center and the defendant is to receive six hundred forty-one (641) days of jail time credit toward his sentence. The defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution, from the

date of imposition of sentence.

/s/ G. W. Fais

G. W. FAIS, JUDGE
Court of Common Pleas
Franklin County, Ohio

IGRC 15y-life/life + 3y actual
5-25y CCRC cst

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

85CR-08-2218
No. 87AP-526
(Regular Calendar)

STATE OF OHIO, *Plaintiff-Appellee*,

v.

LARRY JOE POWERS, *Defendant-Appellant*.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on December 13, 1988, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, P. J., McCORMAC & YOUNG, JJ.

/s/ Alba L. Whiteside

JUDGE ALBA L. WHITESIDE, P. J.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 87AP-526
(Regular Calendar)

[Caption omitted in printing]

OPINION
Rendered on December 13, 1988

APPEAL from the Franklin County Court of Common Pleas. WHITESIDE, P.J.

Defendant, Larry Joe Powers, appeals from a jury decision of the Franklin County Court of Common Pleas and raises eight assignments of error, as follows:

"1. As a matter of law, the trial court erred by failing to grant appellant's motion for a directed verdict of acquittal as to the issue of prior calculation and design, made pursuant to Rule 29(A), of the Ohio Rules of Criminal Procedure.

"2. As a matter of law, Larry Joe Powers' conviction for the aggravated murder of Thomas Kicas and the attempted aggravated murder of Charlotte Golden are not supported by sufficient evidence, and should be reversed.

"3. The trial court erred by overruling appellant's pre-trial motion to dismiss the indictment on the ground that Ohio's death penalty statute is violative of the United States and Ohio Constitutions. This resulted in a denial of Mr. Powers' right to due process of law and a fair trial guaranteed him by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and by Section 10, Article I of the Ohio Constitution.

"4. The trial court erred to the prejudice of appellant by permitting the discriminatory use of peremptory challenges by the state to exclude blacks from the

jury and by failing to compel the state to explain its reasons for perempting black jurors, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 and 16 of the Ohio Constitution.

"5. The trial court erred to the prejudice of the appellant by admitting irrelevant, hearsay testimony into evidence.

"6. The trial court erred in allowing state's witness, Dorothy Twiss, to testify.

"7. Larry Joe Powers was denied a fair trial as guaranteed him by the Fifth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution by the prosecution's misconduct in closing argument.

"8. Larry Joe Powers was denied his right to effective assistance of counsel as guaranteed him by the Sixth and Fourteen Amendments of the United States Constitution and by Article I, Section 10 of the Ohio Constitution, as well as due process of law protections under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 16 of the Ohio Constitution."

On the evening of Friday, July 26, 1985, defendant, Gary Golden, and Thomas Kicas were at Bernard's Grill. In the early hours of Saturday, July 27, 1985, all three met at Golden's home where Charlotte Golden, Golden's ex-wife, also retired. At one point, all three men and Charlotte Golden were in the basement of the home where defendant's gun was placed on a bar stool. After briefly leaving the room and then returning, defendant shot and killed Gary Golden and Thomas Kicas. Charlotte Golden claimed that defendant shot at her.

Defendant was indicted on the following counts: count one, aggravated murder in the death of Gary Golden, a

violation of R.C. 2903.01; and count two, aggravated murder in the death of Thomas Kicas. Each of these counts contained a specification alleging that the conduct involved the purposeful killing or attempt to kill two or more persons pursuant to R.C. 2929.04(A)(5) and a specification alleging that defendant had a firearm. The second count contained a specification that defendant committed aggravated murder of Kicas in order to escape detection, apprehension, trial, or punishment for the aggravated murder of Golden. Count three charged defendant with the attempted aggravated murder of Charlotte Golden, a violation of R.C. 2903.01 and 2923.02. This count also contained a firearm specification.

A jury found defendant guilty of the murder of Gary Golden in violation of R.C. 2903.02, guilty of the aggravated murder of Thomas Kicas in violation of R.C. 2903.01, and guilty of attempted aggravated murder of Charlotte Golden in violation of R.C. 2903.01 and 2923.02. The jury found firearm specifications were proven as to all three verdicts. After a mitigation hearing, the trial court imposed the following sentence upon defendant: fifteen years to life as to count one; thirty years to life as to count two with a three-year term of actual incarceration for the use of a firearm; and five to twenty-five years as to count three. All sentences were ordered to run consecutively.

Defendant, by his first and second assignments of error, contends that the trial court erred when it failed to grant defendant's motion for a directed verdict as to the issue of prior calculation and design, and contends that the jury verdicts of aggravated murder and attempted aggravated murder were unsupported by the evidence.

Crim. R. 29(A) requires the court, upon motion of defendant or on its own motion and after evidence on

either side is closed, to order entry of judgment of acquittal of one or more offenses if the evidence is insufficient to sustain a conviction for such offense or offenses. A trial court must grant a motion for acquittal on any issue if, when viewing the evidence in a light most favorable to the state, reasonable minds can reach only one conclusion and that conclusion is favorable to defendant. In this case, defendant moved for a directed verdict of acquittal as to the issue of prior calculation and design at the close of plaintiff's case-in-chief and again at the conclusion of the defendant's own case.

R.C. 2903.01 requires that, in order for a person to be found guilty of aggravated murder, the murder's act must be committed with "prior calculation and design." The Ohio Supreme Court in *State* v. *Cotton* (1978), 56 Ohio St. 2d 8, stated that the term "prior calculation and design" presents a standard more stringent than the previous standard of "deliberate and premeditated" in that it does not encompass instantaneous deliberation. Later, the Ohio Supreme Court, following and approving *Cotton*, *supra*, stated in the first paragraph of the syllabus of *State* v. *Robbins* (1979), 58 Ohio St. 2d 74, that:

> "Where evidence adduced at trail reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified. * * *"

In *Cotton*, *supra*, the defendant shot his victim, a police officer, scuffled with a second police officer, and then ran back toward his car where he stopped near the first officer, assumed a shooting position, and, with his gun in both hands, shot and killed the first officer. In *Robbins*,

supra, the defendant, after an argument, struck his victim briefly, left the room, and returned with a sword and proceeded to stab the victim. The court noted that there was no evidence of a heated brawl. In both *Cotton*, *supra*, and *Robbins*, *supra*,the court found sufficient prior calculation and design to sustain a conviction for aggravated murder.

Later, in *State* v. *Reed* (1981), 65 Ohio St. 2d 117, the Supreme Court found that a defendant's prior statement that if a cop gets in his way during a robbery he would blow him away was sufficiently removed in time and too general to show prior calculation and design when defendant shot and killed an officer who had stopped defendant after the officer suspected defendant of attempted robbery.

In the case before us, the prosecution presented the testimony of Charlotte Golden, the only person other than defendant who witnessed the shootings and remained alive to testify. Here testimony, if believed, showed that defendant and the two victims were in the basement recreation room of Charlotte's residence engaged in amicable conversation, that after defendant returned to the room, ostensibly having gone upstairs to the bathroom, a gun was seen on an empty bar stool between defendant and Kicas; that, although Kicas and Golden were on their third drinks, defendant had hardly touched his; that defendant was spinning a loaded gun on the bar stool, that when Kicas said, "What are you doing with that piece?" defendant replied, "Maybe I am a hit man"; that when Golden requested defendant to put the gun away, defendant didn't acknowledge that Golden said anything, nor did defendant reply; that when Golden said in a firmer tone, "Show a little respect. This is our home. Put the thing away," defendant jumped up and shot Golden; that Kicas

jumped up from the bar stool and said, "Man, wait"; that defendant said, "You are dead," which was followed by the sound of a shot; that Charlotte ran up the basement steps and, at the top, heard defendant say, "Bitch, you are dead"; that Charlotte ran outside and heard two more shots; and that Charlotte fell and looked back and saw defendant standing on her porch with a gun. Two neighbors testified that they saw defendant run to his truck and immediately and quickly drive away, one neighbor testifying that defendant did not stop at the stop sign.

When viewed in the light most favorable to plaintiff, there is sufficient evidence, if believed, that reasonable minds can conclude beyond a reasonable doubt that defendant shot Kicas and attempted to shoot Charlotte with "prior calculation and design." Unlike *Reed*, *supra*, defendant in this case made a statement about being a "hit man" immediately before the shootings of the unarmed victims. The conversation prior to the shootings was amicable, and there was no evidence of a heated brawl. The trial court did not err by refusing to grant defendant's motion for a directed verdict at the conclusion of the plaintiff's case. Nor did the trial court err by refusing to grant plaintiff's motion for a directed verdict after the conclusion of defendant's case. The state's evidence is sufficient to allow a trier of fact to find beyond a reasonable doubt that defendant killed with prior calculation and design. In addition to plaintiff's earlier testimony, the defendant, during cross-examination, testified that he met with Brad Wellman prior to meeting Golden, that Wellman was aware that Golden was having an affair with Wellman's wife, and that the Sunday after the shootings Wellman gave defendant's wife $2,000.

There was sufficient evidence for a reasonable person to conclude beyond a reasonable doubt that defendant killed

with prior calculation and design, and it was the function of the trier of fact, the jury, and not this court, to determine the credibility of each witness and based thereon also to determine innocence or guilt. The jury found a reasonable doubt as to whether the killing of Golden was with prior calculation and design. In this case, the jury was presented with two different accounts of the shooting, one by defendant and one by the surviving victim. It was for the jury to determine the credibility of each of these witnesses and to decide accordingly. Charlotte's testimony was corroborated on several points by the testimony of one neighbor who witnessed defendant exit the house and run to his truck and another who testified that defendant fired two shots from the front of the house. The neighbor's testimony corroborated Charlotte's testimony that defendant fired a total of four shots. On the other hand, defendant's testimony contradicting that of Charlotte was not corroborated. Accordingly, defendant's first and second assignments of error are not well-taken.

Defendant, by his third assignment of error, contends that R.C. 2903.01 and 2929.02, Ohio's death penalty statutes and the statutes under which defendant was charged, violate provisions of the Ohio and United States Constitutions by permitting the arbitrary and capricious imposition of capital punishment by giving the prosecutor unfettered discretion whether to indict and to prosecute a murder as a capital offense.

It is not the prosecutor who determines an indictment. The grand jury returns all indictments, although the prosecutor may exercise great influence upon the grand jury in this regard but is not allowed to be present while the grand jury (appointed by the common pleas court) votes. See R.C. 2939.10. Freedom of choice as to whom to prosecute is not tantamount to arbitrary or capricious

imposition of sentence. The United States Supreme Court has articulated guidelines for death penalty statutes in *Gregg* v. *Georgia* (1976), 428 U.S. 153, 96 S.Ct. 2909; *Jurek* v. *Texas* (1976), 428 U.S. 262, 96 S.Ct. 2950; and *Florida* v. *Proffitt* (1976), 428 U.S. 242, 96 S.Ct. 2960. In *Zant* v. *Stephens* (1983), 462 U.S. 862, 103 S.Ct. 2733, the court held that the states may constitutionally impose a sentence of death if discretion of sentencing authority is directed and limited so as to minimize the risk of wholly arbitrary and capricious activity. In addition, in *United States* v. *Batchelder* (1979), 442 U.S. 114, the Supreme Court stated that it has long been recognized that, when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest within the prosecutor's discretion, although the grand jury may investigate matters not initiated by the prosecutor. The Ohio Supreme Court in *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, upholding the constitutionality of Ohio's death penalty statutes, quoted the United States Supreme Court in *Gregg*, *supra*, and held that the existence of discretionary stages is not detrimental when, at each stage, an official decision can be made which may remove the accused death-penalty consideration.

This court will not assume that prosecutors are motivated in their decisions to file charges by factors other than the strength of their case and the justification for a jury to impose the death penalty if it convicts. Defendant has presented no facts to show contrary motives. Moreover, the prosecutor is bound by the elements of each offense with which he determines to prosecute a defendant. The prosecutor simply initiates the process. The jury

determines the guilt. Any discretion by the prosecutor to prosecute is similar to the discretion of a police officer to arrest. Absent evidence to the contrary, arbitrary and capricious behavior will not be assumed. Mistakes in judgment can be rectified by the criminal process including the trial and appellate stages. Accordingly, defendant's third assignment of error is not well-taken.

By his fourth assignment of error, defendant contends that the trial court committed prejudicial error by permitting the discriminatory use of peremptory challenges by the state without requiring the state to explain its reasons for use of each peremptory challenge of prospective black jurors.

In this case, the defendant is white, as were the victims and, apparently, the prosecutor and defense counsel. During voir dire of the jury, the state utilized seven of ten peremptory challenges to excuse prospective jurors who were black. Defendant utilized nine peremptory challenges, and the record does not reveal how many, if any, of the jurors excused peremptorily by defendant were black. Likewise, the record does not indicate the number of jurors who were actually seated and heard the case who were black, if any. Nevertheless, defendant objected individually to each peremptory challenge of a black juror by the state, starting with the first peremptory challenge used by the state and ending with the last. The trial court overruled defendant's objections. Likewise, the trial court refused to require the state to explain its reasons for each of the peremptory challenges of a prospective juror who allegedly was black. Actually, the record does not directly reflect the race of the prospective jurors, but in raising the objection defense counsel stated the challenged juror was black without objection or correction either from the prosecutor or the court.

In support of his contentions, defendant relies primarily upon three decisions of the United States Supreme Court, namely, *Peters* v. *Kiff*, (1972), 407 U.S. 493, 92 S.Ct. 2163; *Taylor* v. *Louisiana* (1975), 419 U.S. 522, 95 S.Ct. 692, and *Batson* v. *Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, which overruled *Swain* v. *Alabama* (1965), 380 U.S. 202, 85 S.Ct. 824. Defendant's reliance upon these three cases is misplaced, even though they could be stretched, extended, and expanded to support defendant's contention, if some of the determinative language in *Batson* is ignored. *Peters* involved a challenge by a white defendant to the exclusion of blacks from jury service. There is language in one opinion in that case at 2165, stating:

> "* * * [I]n this case the principles governing the two claims are identical. First, it appears that the same selection process was used for both the grand jury and the petit jury. Consequently, the question whether jurors were in fact excluded on the basis of race will be answered the same way for both tribunals. * * *"

The opinion further states at 2168-2169:

> "If it were possible to say with confidence that the risk of bias resulting from the arbitrary action involved here is confined to cases involving Negro defendants, then perhaps the right to challenge the tribunal on that ground could be similarly confined. The case of the white defendant might then be thought to present a species of harmless error.
>
> "But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues of particular cases. * * *
>
> "* * *

> "Accordingly, we hold that, whatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. * * *"

The foregoing opinion excerpts, however, were concurred in by only three justices of the United States Supreme Court and, therefore, do not constitute the opinion of the United States Supreme Court, much less binding authority upon the issues. Three additional justices concurred in the judgment but only with respect to the exclusion of blacks from grand jury service. These three justices stated in part at 2170, quoting from *Hill* v. *Texas* (1942), 316 U.S. 400, 62 S.Ct. 1159, at 406:

> "Thus, 'no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid . . . . [I]t is our duty as well as the States to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the conviction cannot stand because the Constitution prohibits the procedure by which it was obtained.'"

The concurring justice's opinion continues at 2170, stating:

> "It is true that the defendant in *Hill* was a Negro, and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusions of a class of citizens from jury service where the defendant was not a member of the excluded class. * * * For me, however, the rationale and operative language of *Hill* v. *Texas*

> suggest a broader sweep; and I would implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. * * *"

The three justices did not discuss the exclusion of blacks from petit jury service, and presumably rejected the plurality opinion, including both exclusions as a predicate for reversal, in light of the concurring opinion. More importantly, *Peters* involved adoption of a system for jury selection which automatically excluded blacks from jury service, whether challenged or not, by a selection method which invariably resulted in all prospective jurors selected for a venire being white. The three dissenting justices specifically rejected the concept that a white defendant who is not prejudiced by exclusion of blacks from a jury has no standing to mount a post-conviction attack upon the ground that a discriminatory jury selection has taken place in the past. Accordingly, both because of the issues determined, and because of the somewhat confused state of the decision, *Peters* offers no basis for a determination of the issue herein, there being no clear majority decision and the issue before us being neither addressed nor determined in that case.

Taylor, supra, likewise involved a jury venire selection process under which a class was systematically excluded from service, in this case women. Thus, the Supreme Court stated at 695:

> "The Louisiana jury-selection system does not disqualify women from jury service, but in operation its conceded systematic impact is that only a very few women, grossly disproportionate to the number of eligible women in the community, are called for jury

> service. In this case, no women were on the venire from which the petit jury was drawn. The issue we have, therefore, is whether a jury-selection system which operates to exclude from jury service an identifiable class of citizens constitution 53% of the eligible jurors in the community comports with the Sixth and Fourteenth Amendments."

Quite clearly, the Supreme Court answered that question in the negative. Relying solely upon *Peters*, *supra*, the Supreme Court continued at 695:

> "The State first insists that Taylor, a male, has no standing to object to the exclusion of women from his jury. But Taylor's claim is that he was constitutionally entitled to a jury drawn from a venire constituting a fair cross section of the community and that the jury that tried him was not such a jury by reason of the exclusion of women. Taylor was not a member of the excluded class; but there is no rule that claims such as Taylor presents may be made only by those defendants who are members of the group excluded from jury service. * * *"

The court did not discuss the prejudicial-error rule, which was a predicate for the dissent, nor did the court find the exclusion to be *per se* prejudicial. Nevertheless, the court did limit its determination to the process by which a jury venire is selected and did not address the use of peremptory challenges by the prosecution.

The use of peremptory challenges to exclude all blacks from sitting on a particular jury for discriminatory reasons was discussed and determined in *Batson*, *supra*, with the opinion commencing at 1714, as follows:

> "This case requires us to reexamine that portion of *Swain* v. *Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed. 2d 759 (1965), concerning the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the

> State's use of peremptory challenges to exclude members of his race from the petit jury."

Swain, *supra*, had held that a court must first determine whether a black defendant was denied equal protection to the state's exercise of peremptory challenges to exclude all members of his race from a petit jury. At 1718 to 1719 of the *Batson* opinion, it is stated that:

> "Accordingly, the component of the jury selection process at issue here, the State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason, is related to his view concerning the outcome,' of the case to be tried * * * the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

The question before the court was also whether a defendant had a burden to prove purposeful discrimination on the part of the state, before any explanation by the state need be forthcoming. Under *Swain*, proof of repeated striking of blacks over a number of cases was necessary to establish an Equal Protection Clause violation. In *Batson*, however, the Supreme Court concluded at 1722-1723:

> "The standards for assessing a prima facie case in the context of discriminatory selection of the venire has been fully articulated * * *. These principles support our conclusion that a defendant may establish a *prima facie* case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. *To establish such a case, the defendant must first show that he is a mem-*

ber of a cognizable racial group, Castanedo v. *Partida, supra,* [(1977), 430 U.S. 482, 97 S.Ct. 1272], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *** Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Contrary to defendant's contention, it is only when such a necessary inference of purposeful discrimination has been established that the state is required to explain or justify its use of peremptory challenges of prospective black jurors. Thus, the Supreme Court continued at 1723 of *Batson:*

> "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. ***
>
> "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. Though this requirement imposes a limitation in some cases on the full peremptory character of the historic challenge, we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. *** But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of defendant's race on the assumption —or his intuitive judgment—that they will be partial to the defendant because of their shared race. ***"

As clearly and unequivocally stated in *Batson,* the defendant must first show "that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." Here, defendant complains not of removing jurors of his race by prosecutorial use of peremptory challenges but, instead, complains because members of another race were excluded. Defendant has completely failed to meet the first test of *Batson.* We find no reason to extend *Batson* to include an automatic contention of denial of equal protection or some other constitutional claim by a white defendant because of the use of peremptory challenges by a prosecutor to exclude black members from the jury. In addition, although the evidence indicates that seven of the ten peremptory challenges used by the prosecutor involve black jurors, there is nothing in the record to indicate that all prospective black jurors were excluded from the jury. In other words, there is nothing in the record of this case to indicate that the jury which tried and convicted defendant did not include blacks, or even a proportionate number of blacks. Accordingly, for the reason alone, this case is distinguished from *Peters, Taylor,* and *Batson,* in which cases no members of the affected minority served on the jury which tried and convicted the defendant. Even assuming there be some basis or predicate for a claim by a white defendant that he is prejudiced by the exclusion of blacks from a jury, it is at least incumbent upon such white defendant to demonstrate that the jury

which tried and convicted him included no blacks, especially where, as here, no blacks were connected with the trial, except possibly those who served on the jury, if any.

We are cognizant that defendant also relies upon an Arizona decision permitting a white defendant to raise the issue of discriminatory exclusion of blacks from his jury by the prosecutorial use of peremptory challenges, resulting in a jury including no blacks. However, in that case, although the defendant was white, his defense attorney was black.

Defendant also relies upon *Stanley* v. *State* (Md. 1988), 542 A.2d 1267, a case involving black defendants "convicted at trial by substantially or totally white jurors after most or all potential jurors who are black were excluded from jury service by peremptory challenges used by a state prosecutor." In that case, the court did find the facts and requirements were met so as to shift the burden to the state to come forward with a neutral explanation for challenging the black jurors. The Maryland court held that the exclusion of even one black from the jury by use of peremptory challenge is presumptively discriminatory if it results in an all white jury in a case involving a black defendant.

The *Stanley* court also held that, where eight blacks were peremptorily challenged from the jury in a trial of a black defendant, there is a presumption of discriminatory prosecutorial use of peremptory challenges, even though there were three blacks on the final jury. It is somewhat difficult to understand the *Stanley* court presumption in light of the fact that the final jury (presumably twelve members) included three blacks, or twenty-five percent, and the original venire included less than twenty-five

percent blacks. In other words, where the end result is that the percentage of blacks on the jury is equal to the percentage of blacks in the venire, it is difficult to presume improper discrimination on the part of the prosecution. Neither a white nor black defendant is entitled to a jury of a particular race. Here, defendant used nine peremptory challenges to exclude prospective members of the jury. If all of those were white, which does not appear from the record, then we have a situation where peremptory challenges were used to exclude twelve whites and seven blacks from the jury, resulting in a jury of an unknown racial mix. Any discriminatory purpose is mitigated by the fact that the victims, the defendant, and all other trial participants, with the possible exception of some of the jurors, are white.

Even assuming that there may be circumstances under which a white defendant may be prejudiced by the exclusion of blacks from his jury by prosecutorial use of peremptory challenges of blacks, this has not been demonstrated to be such a case. Under *Batson*, the threshold showing must be that the members of the defendant's race have been excluded from jury service. There is no showing here. At the very minimum, for a white defendant to raise the issue of the use of prosecutorial peremptory challenges to exclude blacks, such white defendant must demonstrate prejudice to him resulting from such exclusion and must demonstrate that the resultant jury included no blacks, or at least a substantially disproportionate number of blacks.

Where the members of the defendant's race have not been excluded from jury service by the use of peremptory challenges by the prosecution, the prosecution need not explain its use of peremptory challenges to exclude the members of another race from the jury, in the absence of a

demonstration by the defendant that such exclusion was systematic and results in prejudice to the defendant or, in effect, denies him a fair trial. The *Batson* rule is slightly different if members of the defendant's race are systematically excluded by the prosecution by use of peremptory challenges.

Accordingly, defendant has not met the threshold conditions necessary to require the state to explain its use of peremptory challenges, and the fourth assignment of error is not well-taken.

By his fifth assignment of error, defendant contends that the trial court admitted irrelevant hearsay testimony. Specifically, defendant argues that two statements in the testimony of a police officer were both irrelevant and hearsay. The testimony centered around actions of defendant's brother and sister when the police arrived to impound defendant's vehicle. Such statements of defendant's siblings were obviously hearsay. The officer testified that defendant's brothers stated, "You have no right being here on the property," and "We already cleaned it [the vehicle] out, you're too late". (Tr. XIII, 433-435).

The state concedes that these two statements were hearsay and that defendant timely objected. However, the state further contends that the improper admission of this hearsay testimony was not prejudicial in this case. We agree that defendant has not demonstrated that the error was prejudicial.

We agree also with defendant's contention that the evidence was irrelevant. In fact, the evidence is so irrelevant that it has no probative value in this case, and we are at a loss to understand how it prejudiced defendant since it would be clear to the jury that the evidence had no bearing upon defendant's guilt or innocence. Defendant does

contend that somehow this evidence would indicate that defendant's family were people who purposely obstruct police business and would constitute an implication that the family was trying to hide evidence of criminal conduct. We find no basis for such an inference in the record. As to the sister's conduct, the testimony indicates that she removed a black purse and a brown paper bag from the vehicle. The only inference from this conduct was that she was attempting to retrieve her own personal property from the vehicle before it was impounded by the police. There is no evidence nor suggestion that either the purse or bag contained anything pertaining to defendant himself. Again, although the testimony may have been irrelevant, we find no prejudice. Since defendant has not demonstrated the error to be prejudicial, the fifth assignment of error is not well-taken.

By the sixth assignment of error, defendant contends that the trial court erred in allowing the state witness, Dorothy Twiss, to testify because such testimony was irrelevant. Twiss was the sister of one of the victims. She merely testified that that victim had obtained a new job and was celebrating his employment, meaning his visit to the home of the other victim. Although defendant did object before direct examination of Twiss as to testimony concerning the character of her brother, no such testimony was forthcoming. Defendant did not object during direct examination to her testimony concerning the victim's obtaining employment and celebration thereof. The state contends that the evidence as to the reason for the victim's presence in the basement on the evening in question tends to negate defendant's defense of self-defense. Under the circumstances, defendant has not demonstrated error, has not demonstrated an objection, and has not demonstrated prejudice. The sixth assignment of error is not well-taken.

By the seventh assignment of error, defendant contends that the judgment should be reversed because of prosecutorial misconduct during the closing argument. The state contends there was no prosecutorial misconduct and that the statements made by the prosecution were proper and were invited by defense counsel's closing argument. Basically, we find none of these contentions of the parties to be correct. The comment of the prosecutor was first that the prosecution was not required to prove motive and could not in this case prove motive. Then, to enhance the chance that the jury would find prior calculation and design, the prosecutor asked the jury to speculate as to motive by reference to some essentially irrelevant evidence adduced at trail through cross-examination of defendant. The prosecutor bragged in his closing argument to the jury that he "set the defendant up" and "elicited that testimony." (Tr. XIII-837.) The prosecutor continued on this irrelevan' vein as to how defendant did not volunteer testimony of having been at a friend's house before he went to the bar where he met victim Golden and was introduced to victim Kicas. This meeting led to their going to Golden's home where the shooting occurred hours later.

The prosecutor commented essentially as follows (Tr. XIII, 836):

> "* * * Because no finder of fact, no jury, including you ladies and gentlemen, is going to go back there and start discussing about what happened regarding two dead men and not wonder about why it happened. Of course, you want to know why it happened. You don't kill two men for no reason.
>
> "So the issue of motive is important, and because it is important, Mr. Moore and I brought you some evidence of motive. We did not prove motive to you because we cannot prove to you what was going on in

> the Defendant's mind when the shots were fired. But we brought you some evidence of motive because you would want to know and we want you to know what we do about motive.
>
> "Now, you will be instructed, and its on page 6 of your instructions, that proof of motive by the State is not required. You know that, you know that from voir dire.
>
> "The evidence that Mr. Moore and I presented to you regarding the issue of motive—and I'm only talk [*sic*] about motive, I'm not talking about prior calculation and design—the evidence that we presented to you regarding motive is as follows: Nancy Wellman and the first victim, Gary Golden, had an affair some seven months before the shooting. The defendant and Nancy Wellman's husband, Bud, were good friends for many years. We know that Bud Wellman helped the Defendant financially in the past several times.
>
> "We know that the Defendant visited the home of Bud Wellman and talked to Bud Wellman approximately one hour before he went to Bernhards. Maybe it was an hour and 15 minutes, maybe, it was an hour and a half, but he said 8:00 p.m., he knows that he got to Bernhards about 9:00 p.m.
>
> "I want you to think about that fact for a minute. It's awfully important to me. * * *"

There is not even a scintilla of evidence suggesting that Wellman hired defendant to kill Golden. Likewise, there is not even a scintilla of evidence that defendant killed Golden because Golden had had an affair with defendant's friend's wife some months before. These innuendos are a figment of the prosecutor's imagination. Not even he directly made such statements but, instead, insinuated the result by his references to this testimony as being evidence of motive, which is not. The prosecution is not required to prove motive, and it is improper for the pros-

ecutor to comment upon motive or evidence of motive unless there is some evidence of the motive (for the alleged act of the defendant). The only other evidence bearing upon the prosecutor's improper comment was the statement of the surviving victim before the shooting when asked to put the gun away, that defendant stated, "Maybe I'm a hit man." Unfortunately, the prosecutor by his last comment did inject his personal opinion or feelings into his argument, stating the testimony "was very important to him." Furthermore, the prosecutor asked the jury to speculate as to motive, since there was no reasonable inference from the evidence adduced as to defendant's motive. The evidence created at most a possibility of a reason for defendant's killing the two men but did not rise to the level where reasonable inference could be made that such a motive existed.

The prosecutor further contends that he was merely responding to comments of defense counsel during closing argument and, therefore, was justified. Defense counsel's comment was a prediction as to what the prosecutor would argue during the final portion of the prosecutor's argument, the comment upon motive not having been made during the first portion of the argument. Defense counsel suggested that the prosecutor planned to raise this issue in the last portion of his argument when there could be no response from defense counsel. Defense counsel apparently responded in anticipation that the argument would be made by the prosecutor.

Such types of gamesmanship are reprehensible. As defendant contends, the argument was improper because there was no evidence from which a reasonable inference could be made as to motive, the prosecutorial comments being mere speculation unsupported by evidence. The proper course for defendant would be under these circumstances to object to the improper argument and have the trial court admonish the jury to disregard it and instruct the jury that there is no evidence of motive. Defense counsel did not do so.

The alternative course available to defense counsel, if the prosecutor persists in making important portions of his closing argument for the first time in his final argument, is to request from the trial court an opportunity to respond to such new argument. It would be an abuse of discretion on the part of the trial court to deny defense counsel an opportunity to respond to argument essential to the determination made by the prosecutor for the first time in the final portion of his argument. The alternative course for the trial court is to instruct the jury to disregard the prosecutor's argument and admonish the prosecutor.

Trial by combat has long since been abolished. Counsel are not champions engaged in combat to determine which one may outsmart the other or outfight the other and, thus, "win" for his client. Trials are a serious business, especially criminal murder trials, and all actions of counsel and the trial court should be to assure that justice is served in a proper manner within the rules of conduct.

Nevertheless, considering the totality of the circumstances involved, we do not find the prosecutorial misconduct to be so egregious as to require court interference or as to constitute plain error. There was no objection by defense counsel who, instead, anticipated the prosecutor's argument and commented upon it during defense counsel's closing argument, rather than waiting to object thereto. It would appear, therefore, at that time that defense counsel assumed the argument was proper and not objectionable, or because of trial strategy felt it was

better to have the prosecutor make this evidentially unsupported argument in hopes that the jury would be perceptive enough to recognize the lack of evidentiary support for the prosecutor's argument and, accordingly, question all parts of the prosecutor's argument because of this speculation on the part of the prosecutor.

In light of the jury verdict, it is more probable that the jury recognized the impropriety of the prosecutor's argument speculating as to motive for the killing of Golden, which may have contributed to the jury's finding defendant not guilty of aggravated murder as to Golden but guilty of murder. In any event, the prosecutor's attempt to bolster his case by the improper argument failed. The jury found defendant not guilty of aggravated murder with respect to the victim Golden as to whom the prosecutor speculated there was a motive either for murder for hire or for revenge. The jury didn't "buy" the speculation of the prosecutor so that for practical purposes it had no effect upon the verdict. Since defense counsel did not object, the improper comment is not so egregious as to require court intervention or to be plain error, and the jury rejected the prosecutor's speculation, there is no prejudicial error, and the seventh assignment of error is not well-taken.

By the eight assignment of error, defendant contends that he was denied effective assistance of counsel because defense counsel failed to object to the improper prosecutorial argument which is the subject of the seventh assignment of error. However, as noted above, this may have been trial strategy since defense counsel anticipated the prosecutorial argument during defense counsel's closing argument. The jury accepted defense counsel's anticipatory argument rather than the speculation by the prosecutor. In short, if that were the trial strategy of

defense counsel, it was successful. In any event, there is no indication of ineffective assistance of counsel, and the eighth assignment of error is not well-taken.

For the foregoing reasons, all eight assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

McCORMAC and YOUNG, JJ., concur.

THE SUPREME COURT OF OHIO

1989 TERM

To wit: April 5, 1989

Case No. 89-254

STATE OF OHIO, *Appellee*,

v.

LARRY JOE POWERS, *Appellant*.

ENTRY 69-225

Upon consideration of the motion for leave to appeal from the Court of Appeals for Franklin County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 87AP526)

/s/ Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

1989 TERM

To wit: May 3 1989

Case No. 89-254

[Caption omitted in printing]

REHEARING ENTRY
(Franklin County)
69-296

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals No. 87AP526)

/s/ Thomas J. Moyer

THOMAS J. MOYER
Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 89-5011

LARRY JOE POWERS, *Petitioner*,

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Ohio, Franklin County.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 20, 1990

PETITIONER'S

BRIEF

(5)

No. 89-5011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY JOE POWERS, *Petitioner,*

v.

STATE OF OHIO, *Respondent.*

On Writ Of Certiorari To The Tenth District Court Of Appeals, Franklin County, Ohio

---

BRIEF FOR PETITIONER

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

GREGORY L. AYERS
Chief Counsel

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: 614/466-5394

Counsel for Petitioner

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

41pp

QUESTION PRESENTED

In a criminal case, does a white defendant have standing to object, pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986), to the prosecution's peremptory challenge of black prospective jurors?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

OPINIONS BELOW

The order of the Supreme Court of Ohio [Joint Appendix (hereinafter J.A.) 42] overruling Petitioner Powers' motion for leave to appeal and claimed appeal as of right from the judgment of the Court of Appeals of Franklin County, Ohio is not reported. The order of the Supreme Court of Ohio (J.A. 43) denying Petitioner's motion for rehearing is not reported. The opinion of the Court of Appeals of Franklin County, Ohio (J.A. 16) is not reported.

JURISDICTION

The judgment of the Supreme Court of Ohio denying Petitioner's motion for rehearing was entered on May 3, 1989. (J.A. 43). The petition for certiorari was filed within 60 days of that date, on June 30, 1989, and was granted on February 20, 1990. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

FOURTEENTH AMENDMENT

> Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

STATEMENT OF THE CASE

On August 8, 1985, the Franklin County, Ohio Grand Jury returned an indictment charging Larry Joe Powers, Petitioner herein (hereinafter Powers), with two counts of Aggravated Murder, violations of Ohio Revised Code Annotated (Page) (hereinafter O.R.C.) § 2903.01, and one count of Attempted Aggravated Murder, a violation of O.R.C. §§ 2923.02 and 2903.01. Each count contained a separate specification alleging that Powers had a firearm on or about his person or under his control while committing the offense, a violation of O.R.C. § 2929.71. (J.A. 1). Powers pled not guilty to these charges and the case proceeded to a jury trial.

During *voir dire*, the State of Ohio used seven (7) of ten (10) peremptory challenges to exclude black venirepersons from the jury. (J.A. 24). Each time, the defense objected to the State's discriminatory use of its peremptory challenges and requested that the trial court compel the prosecutor to explain, on the record, his reasons for excluding blacks. Much to the prejudice of Larry Joe Powers, the court overruled his objections and failed to require the State to explain its reasons for using its peremptory challenges in a racially discriminatory manner. (Tr. Vol. 5, pp. 907, 908; Tr. Vol. 6, pp. 1220, 1374, 1375, 1549-1553; Tr. Vol. 7, pp. 196, 197; Tr. Vol. 8, pp. 1982, 2281). (J.A. 4-11).

Powers was ultimately found guilty of one count of Murder, a violation of O.R.C. § 2903.02, one count of Aggravated Murder, one count of Attempted Aggravated Murder, and the firearm specifications. The trial court sentenced Powers to an aggregate sentence of fifty-three (53) years to life in the Ohio penal system. (J.A. 12, 13).

Powers filed a timely appeal in the Franklin County, Ohio Court of Appeals. On December 13, 1988, the Court

of Appeals rendered an opinion overruling Powers' appeal and affirming his conviction. (J.A. 15, 16).

In that appeal, Powers argued that his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to equal protection were violated by the prosecutor's discriminatory use of his peremptory challenges, citing *Batson* v. *Kentucky*, 476 U.S. 79 (1986). Additionally, Powers argued that he had standing to raise this issue despite the fact that he is white and the prospective jurors who were excluded were black. The Court of Appeals rejected Powers' argument. The Court refused to extend the constitutional protections of *Batson* v. *Kentucky*, *id.*, to a white defendant where the prosecutor has used peremptory challenges to remove black prospective jurors. (J.A. 24-34).

Powers appealed the judgment of the Ohio Court of Appeals to the Supreme Court of Ohio. On April 5, 1989, the Supreme Court dismissed his appeal on the ground that "no substantial constitutional questions exists therein." (J.A. 42). Powers then filed a motion for rehearing. On May 3, 1989, the Ohio Supreme Court overruled that motion. (J.A. 43).

SUMMARY OF ARGUMENT

This Court has a longstanding tradition of prohibiting racial discrimination in the criminal justice system. In *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), his Court held that a State denies a black defendant equal protection when he is tried before a jury from which other blacks have been excluded because of their race. *Id.* at 309. The decision in *Strauder* was based upon the then newly adopted Fourteenth Amendment to the United States Constitution. In subsequent years, this Court rendered a multitude of decisions which affirmed the principles of

equal protection and condemned racial discrimination in many areas of American life, including the jury selection process.

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), the Court reaffirmed the principle that the Fourteenth Amendment prohibits prosecutors from using their peremptory challenges to remove black jurors on the basis of their race. *Id.* at 84, 89. The Court also determined what a defendant must show in order to establish a *prima facie* case of purposeful discrimination in the selection of the petit jury. *Id.* at 96.

This Court in *Batson* identified three important values which support a defendant's equal protection challenge to racial discrimination in jury selection. *See Holland* v. *Illinois*, ___ U.S ___, 110 S. Ct. 803, 813 (1990) (Marshall, J., dissenting). The first is the right of the defendant to a jury that has been selected pursuant to nondiscriminatory criteria. *Batson*, 476 U.S. at 85-86. This value encompasses the defendant's Fourteenth Amendment right to a jury trial, *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968); a jury that will protect the defendant from the arbitrary and oppressive powers of the government. *Id.* at 151. The exclusion of blacks from the jury contravenes "the very idea of a jury." *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330 (1970).

The second important value is the Fourteenth Amendment right of a member of the community not to be excluded from jury service on account of his race. *Batson*, 476 U.S. at 87; *Carter*, 396 U.S. at 329. A person's competence to serve on a jury depends on his or her individual qualifications and impartiality to consider the evidence presented at trial. *Batson*, 476 U.S. at 87. A prospective juror's race is unrelated to his fitness to serve on a petit

jury. *Id.* Petitioner Powers has standing to assert the interests of the excluded jurors because he has been injured in fact by their exclusion and because he is the proper proponent of their legal claims. *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976); *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). He is the proper proponent of these claims due to his substantial relationship to the jurors, the genuine obstacles which hinder the jurors from asserting their own rights, and the impact of Powers' litigation on the excluded jurors. *Singleton*, 428 U.S. at 113-18; *Craig* v. *Boren*, 429 U.S. 190, 196 (1976).

The third value recognized by *Batson* is the need to preserve the "public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Public confidence in the fairness of the American justice system is essential to our democratic society. *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Racial discrimination in the administration of justice erodes that public confidence and damages the entire community. *Batson*, 476 U.S. at 87. This Court has repeatedly required the reversal of criminal convictions where juries have been selected by racially discriminatory procedures. *See Vasquez* v. *Hillery*, 474 U.S. 254, 262 n. 5 (1986).

Both the defendant and the excluded jurors in *Batson* were black. However, the values and principles underlying the *Batson* decision are shared by and important to all criminal defendants, regardless of race. *Holland*, ___ U.S. ___, 110 S. Ct. at 812 (Kennedy, J., concurring). The discriminatory use of peremptory challenges against black jurors is not limited to cases involving black defendants. *Id.* at 822 (Stevens, J., dissenting). In the case at bar, Petitioner Larry Joe Powers is white, while the seven (7) jurors to whose exclusion he objected were black. In *Holland*, five members of this Court expressly stated that

nothing in *Batson* prohibits a white defendant from objecting to the prosecution's use of peremptory challenges to remove black jurors on account of their race. *Holland*, ___ U.S. ___, 110 S. Ct. at 812 (Kennedy, J., concurring); *id.* at 813-14 (Marshall, J., with whom Brennan, J., and Blackmun, J., joined, dissenting); *id.* at 821-22 (Stevens, J., dissenting). Thus, it is clear that the defendant's race is irrelevant to the operation of the prohibition against the prosecutor's exercising his peremptory challenges in a racially discriminatory manner. *Id.* at 819 (Marshall, J., dissenting).

This Court has previously held that a white defendant has standing to object to the exclusion of black jurors under the Due Process Clause, *Peters* v. *Kiff*, 407 U.S. 493, 504 (1972), and under the Sixth Amendment's fair cross-section provision. *Holland*, ___ U.S. ___, 110 S. Ct. at 805. The logical extension of these holdings, and *Batson*, 476 U.S. 79, is that a white defendant also has standing to object under the Equal Protection Clause. By granting standing to raise a *Batson* claim to all defendants, regardless of race, this Court can further strengthen the guarantee of equal protection of the law.

ARGUMENT

IN A CRIMINAL CASE, A WHITE DEFENDANT HAS STANDING TO OBJECT, PURSUANT TO *BATSON* V. *KENTUCKY*, 476 U.S. 79 (1986), TO THE PROSECUTION'S PEREMPTORY CHALLENGE OF BLACK PROSPECTIVE JURORS.

1. THE SUPREME COURT OF THE UNITED STATES HAS A LONGSTANDING TRADITION OF PROHIBITING RACIAL DISCRIMINATION IN THE ADMINISTRATION OF JUSTICE.

Beginning with *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), this Court has consistently prohibited racial discrimination in the criminal justice system. In *Strauder*, this Court held that a State denies a black defendant equal protection of the law when it puts him on trial before a jury from which blacks have been excluded because of their race. *Id.* at 310. *Strauder* recognized that the primary purpose of the Fourteenth Amendment is to remedy the evil of racial discrimination:

> ". . . its design was to protect an emancipated race, and to strike down *all possible* legal discriminations against those who belong to it."

Id. (emphasis added). Thus, the Fourteenth Amendment stands for the principles that the law shall be the same for the black as for the white and that all persons, regardless of their respective races, shall stand equal before the law. *Id.* at 307. The principles announced in *Strauder* have never been questioned in any subsequent decision of this Court. *Batson* v. *Kentucky*, 476 U.S. 79, 89 (1986).

On the same day this Court rendered its decision in *Strauder*, it also decided *Virginia* v. *Rives*, 100 U.S. 313 (1880), and *Ex parte Virginia*, 100 U.S. 339 (1880). In the latter case, Justice Strong, writing for the majority, wrote:

> A state acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that *no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws*. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or

> the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Id. at 347 (emphasis added).

The actions of a prosecuting attorney, a State agent, which deny any person the equal protection of the law are prohibited by the Fourteenth Amendment. *Virginia* v. *Rives*, 100 U.S. at 318.

In subsequent cases, this Court has repeatedly struck down State procedures that were racially discriminatory. *See Neal* v. *Delaware*, 103 U.S. 370 (1881), and *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935). In *Smith* v. *Texas*, 311 U.S. 128 (1940), this Court held that racial discrimination that results in the exclusion from jury service of otherwise qualified groups violates not only the Constitution, "but is at war with our basic concepts of a democratic society and a representative government." *Id.* at 130.

See also Shelley v. *Kraemer*, 334 U.S. 1 (1947) (judicial enforcement by state courts of restrictive covenants which discriminate against black purchasers of real estate is a denial of equal protection); *Cassell* v. *Texas*, 339 U.S. 282 (1949) (equal protection clause prohibits racial discrimination in the selection of the grand jury; a criminal conviction must be reversed where it is based upon an indictment returned by a grand jury from which black persons have been excluded by racial discrimination); *Avery* v. *Georgia*, 345 U.S. 559 (1953) (procedure employed in choosing prospective petit jurors violated equal protection and provided easy opportunity for those to discriminate who are of a mind to discriminate); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (state laws which prohibit interracial marriages found to violate equal protection and due process); *Peters* v. *Kiff*, 407 U.S. 493 (1972) (criminal defendant is denied due process when the State denies him standing to challenge racially discriminatory system used to select his grand and petit juries); *Casteneda* v. *Partida*, 430 U.S. 482 (1977) (State failed to rebut defendant's *prima facie* case of discrimination against Mexican-Americans in grand jury selection).

In *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court continued its commitment to prohibiting racial discrimination in the justice system. *Batson* reaffirmed the principles of *Strauder* that the central concern of the Fourteenth Amendment is to put an end to governmental discrimination on account of race; and that the "[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." *Id.* at 85.

In *Batson*, the Court determined what a defendant must show to establish racial discrimination by the prosecution in the exercise of its peremptory challenges. Batson was a black defendant tried by an all white jury after the prosecutor used peremptory challenges to strike all four black persons on the venire. *Id.* at 83. This Court held that a defendant could establish a *prima facie* case of racial discrimination by showing the following: First, that he was a member of a cognizable racial group and the prosecutor exercised peremptory challenges to remove jurors of the defendant's race. *Id.* at 96. Second, that he is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate" (citation omitted). *Id.* Finally, that these facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude jurors from the petit jury on account of their race. *Id.*

The *Batson* court identified three reasons why the Equal Protection Clause prohibits racial discrimination by the State in jury selection: (1) the right of the defendant "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," *id.* at 85-86; (2) the right of a member of the community not to be excluded from jury service on account of his race, *id.* at 87; and (3) the need to preserve "public confidence in the fairness of our system of justice." *Id. See also Holland* v. *Illinois*, ___ U.S. ___, 110 S. Ct. 803, 812 (1990) (Kennedy, J. concurring); *id.* at 813 (Marshall, J., with whom Brennan, J., and Blackmun, J., joined, dissenting); and *id.* at 821 (Stevens, J., dissenting).

Finally, as recently as this year the Court again acknowledged "the constitutional goal of eliminating racial discrimination in our system of criminal justice." *Id.* at 810. In *Holland*, *id.* at 805, a white defendant challenged, on Sixth Amendment grounds, the prosecution's peremptory challenge of two blacks from the jury. The Court denied relief. The Court found that while Holland, a white defendant, had standing to raise this claim, the Sixth Amendment's fair cross-section requirement did not prohibit this state action. *Id.* at 806. The majority opinion expressly left open the issue of whether Holland's claim would be meritorious if made on equal protection grounds. *Id.* at 811. However, five Justices (Kennedy, Marshall, Brennan, Blackmun, and Stevens) expressly stated that Holland's claim would be valid under the Equal Protection Clause. *See id.* at 811 (Kennedy, J., concurring); *id.* at 812-13 (Marshall, J., with whom Brennan, J., and Blackmun, J., joined, dissenting); and *id.* at 821 (Stevens J., dissenting).

In his concurring opinion in *Holland*, *id.* at 811-12, Justice Kennedy explained:

> To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.

Justice Kennedy further opined that the values supporting the *Batson* decision are shared by and important to all criminal defendants. *Id.* at 812.

Unlike Holland, Powers has raised an equal protection claim challenging the exclusion of blacks from his jury. If this Court is to remain true to its longstanding tradition of prohibiting racial discrimination in the administration of justice, this Court must recognize Powers' standing to raise this claim. The values which supported the equal protection claim in *Batson* apply with equal force to a white defendant raising the same claim.

II. A DEFENDANT IN A CRIMINAL CASE, REGARDLESS OF HIS RACE, HAS A PERSONAL INTEREST IN HAVING HIS CASE TRIED BEFORE A JURY THAT HAS BEEN SELECTED IN A RACIALLY NONDISCRIMINATORY MANNER.

A defendant has the right to be tried by a jury whose members have been selected pursuant to nondiscriminatory criteria. *Batson*, 476 U.S. at 85-86, citing *Martin* v. *Texas*, 200 U.S. 316, 321 (1906), and *Ex parte Virginia*, 100 U.S. at 345. *See also Cassell* v. *Texas*, 339 U.S. 282, 287 (1950) (The defendant in a criminal case is entitled to have his fate determined by a jury in the selection of which there has been neither inclusion nor exclusion because of race). The Sixth and Fourteenth Amendments require that petit jurors must be drawn from a source fairly representative of the community.

Taylor v. *Louisiana*, 419 U.S. 522, 538 (1975). While there is no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population, *id.* at 538, the jury selection process must be free of racial discrimination. *Strauder*, 100 U.S. at 306-07. A defendant's valued right to a jury trial cannot be gainsaid.

Trial by jury is a fundamental right secured by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). A jury serves to protect the criminal defendant's life and liberty from the arbitrary and oppressive powers of the government. *Id.* at 151. As long ago as 1866, this Court recognized the important role that a jury must play in protecting civil liberties. *Ex parte Milligan*, 4 Wall. 2, 126 (1866). The framers of the Constitution were concerned with guarding the foundation of civil liberty against the abuses of unlimited power. They knew that a trial by an established court, assisted by an impartial jury, was the only sure way of protecting the citizen against oppression and wrong. *Id.* The right to a jury trial gives the defendant an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. *Duncan*, 391 U.S. at 156. In order to protect against unchecked government power, the Federal Constitution insists upon community participation in the determination of guilt or innocence. *Id. See also Batson*, 476 U.S. at 86 n. 8.

A jury is a body composed of the defendant's peers or equals; persons having the same legal status in society as that which the defendant holds. *Strauder*, 100 U.S. at 308. The exclusion from the petit jury of identifiable segments of the community cannot be squared with the constitutional concept of jury trial. *Taylor*, 419 U.S. at 530. The exclusion of blacks from the jury "contravenes the very

idea of a jury." *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330 (1970). When identifiable segments are removed from the jury, they take with them qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. *Peters* v. *Kiff*, 407 U.S. at 503; *McCleskey* v. *Kemp*, 481 U.S. 279, 311 (1987). In light of the important function the petit jury serves, it is imperative that the process used to select that jury be free of any suggestion of racial discrimination. Jurors must be "indifferently chosen" to secure the defendant's Fourteenth Amendment right to "protection of life and liberty against race or color prejudice." *Strauder*, 100 U.S. at 309; *Batson*, 476 U.S. at 87. *See also McCleskey*, 481 U.S. at 309 n. 30.

This Court has previously held that a white defendant has standing to challenge the exclusion of blacks from the grand and petit juries which indicted and convicted him. *Peters* v. *Kiff*, 407 U.S. 493 (1972). In *Peters*, the defendant alleged that blacks had been systematically excluded from both his grand and petit juries. He contended that his conviction was invalid under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The respondent countered that, because Peters was white, he had not suffered any unconstitutional discrimination and that his conviction should stand. *Id.* at 494.

In reviewing Peters' claims, this Court relied on the Fourteenth Amendment guarantee of due process. *Id.* at 496. The Court also reasserted its longstanding position that the Constitution prohibits jury selection practices which systematically exclude blacks. *Id.* at 497. The Court recognized the harm that racial discrimination causes criminal defendants, excluded jurors, and members of the excluded class who have not, themselves, been excluded from a jury. *Id.* at 497-500.

The Court concluded that where a State provides no remedy to a defendant who has been indicted and tried by grand and petit juries that were clearly illegal in their composition, the defendant is denied due process. *Id.* at 501. A state cannot subject a defendant to indictment or trial by a jury that has been selected in an arbitrary or discriminatory manner, in violation of the Constitution. *Id.* at 502.

Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process, create the appearance of bias in individual cases, and increase the risk of actual bias. *Id.* at 502-03. Even if there is no showing of actual bias, circumstances that create the likelihood or appearance of bias violate due process. *Id.* at 502. Proof of actual harm, or lack of harm, is virtually impossible to adduce where discriminatory jury selection practices are challenged. *Id.* at 504. "For there is no way to determine what jury would have been selected under a constitutionally valid system, or how that jury would have decided the case." *Id.* at 504. In granting standing to Peters, this Court held that the opportunity to challenge the jury should be given to too many defendants, rather than to too few. *Id.* at 504.

> Accordingly, we hold that *whatever his race* a criminal defendant has standing to challenge the system used to select his grand or petit jury on the ground that it arbitrarily excludes from service the members of any race, and thereby denies him due process of law. This certainly is true in this case where the claim is that Negroes were systematically excluded from jury service. For Congress has made such exclusion a crime. 18 U.S.C. § 243.

Id. at 504-05 (emphasis added). *See also* Justice White's concurring opinion, *id.* at 507 (". . . I would implement the strong statutory policy of § 243, which reflects the central

concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction . . . This is the better view, and it is time that we now recognize it in this case and as the standard governing criminal proceedings instituted hereafter.").

Subsequently, in *Taylor* v. *Louisiana*, 419 U.S. at 522, a male defendant, raising a Sixth Amendment fair cross-section claim, successfully challenged a statute limiting representation of women on state court venires. The Court wrote: "[T]here is no rule that claims such as *Taylor* presents may be made only by those defendants who are members of the group excluded from jury service." *Id.* at 526. *Accord Holland* v. *Illinois*, ___ U.S. ___, 110 S. Ct. at 805.

Similarly, in *Holland*, ___ U.S. ___, 110 S. Ct. at 811-29, five members of this Court expressly stated that a white defendant does have standing to challenge on equal protection grounds the prosecutor's use of peremptory challenges to exclude black jurors. In his concurring opinion, Justice Kennedy wrote:

> Many of the concerns expressed in *Batson*, a case where a black defendant objected to the exclusion of black jurors, support as well an equal protection claim by a defendant whose race or ethnicity is different from the dismissed juror's. *** As Justice MARSHALL states, *Batson* is based in large part on the right to be tried by a jury whose members are selected by nondiscriminatory criteria and on the need to preserve public confidence in the jury system. These are not values shared only by those of a particular color; they are important to all criminal defendants.

Id. at 812.

In a dissenting opinion in which Justices Brennan and Blackmun joined, Justice Marshall wrote that a defend-

ant's race is irrelevant to his standing to raise an equal protection claim under *Batson*. *Id.* at 813. The language of the majority opinion in *Batson* reflects the fact that both *Batson* and the excluded jurors were black. However, the *Batson* Court did not hold that a white defendant could not make out a *prima facie* case based on the exclusion of black jurors. *Id.*

In a separate dissenting opinion, Justice Stevens agreed with Justices Kennedy and Marshall that the *Batson* principles are not limited to cases in which the defendant and the excluded jurors are of the same race. *Id.* at 821. Batson had standing to challenge the prosecutor's actions based upon his status as a defendant. He had no interest in serving as a juror and was not a member of the excluded class. *Id.*

> Indeed, the suggestion that only defendants of the same race or ethnicity as the excluded jurors can enforce the jurors' right to equal treatment and equal respect recognized in *Batson* is itself inconsistent with the central message of the Equal Protection Clause.

Id. at 821-22 (Stevens, J., dissenting).

Strong policy reasons further support the conferring of standing to a white defendant when he objects to the exclusion of blacks from the jury on equal protection grounds. A defendant's right at trial to have his jury selected in a racially nondiscriminatory manner is equal to, if not greater than, his right to have the jury selected from a fair cross-section of the community. While a defendant has a right to have the jury venire reflect a fair cross-section of the community, he has no right to have it reflected on his jury. *Holland*, ___ U.S. ___, 110 S. Ct. at 807. On the other hand, a defendant does have an absolute right to have his jury selected in a non-discriminatory manner. Thus, a defendant has a greater claim to standing on equal protection grounds that on fair cross-section principles.

It is true that racial discrimination is most likely to occur when a black defendant is on trial because of the State attorney's false assumption that blacks cannot fairly try blacks. But this is not the only situation where race prejudice in jury selection occurs. It is simply the most obvious. *See Holland*, *id.* at 812 (Kennedy, J., concurring).

The discriminatory use of peremptory challenges against black jurors is not limited to cases involving black defendants. *Id.* at 822 (Stevens, J., dissenting); Doyel, *In Search Of A Remedy For The Racially Discriminatory Use of Peremptory Challenges*, 38 OKLA. L. REV. 385, 386 (1985). *Batson* recognized that some prosecutors act on the assumption that blacks as a group are not qualified to sit as jurors. These prosecutors either look at those jurors as being inferior or incapable of fairly judging guilt or innocence because of their race. *Batson*, 476 U.S. at 86. As a practical matter, it is not likely that these prosecutors will view those jurors any differently or harbor less bias towards them simply because the defendant is white instead of black. To be sure, prosecutors' practice manuals instruct their readers to avoid minority jurors. Alschuler, *The Supreme Court And The Jury: Voir Dire, Peremptory Challenges, And The Review Of Jury Verdicts*, 56 U. CHI. L. REV. 153, 187 (1989). *See also Batson*, 476 U.S. at 104 (Marshall, J., concurring) (describing Dallas County, Texas prosecutor's instruction manual which advises prosecutors to eliminate minority jurors during jury selection).

The harm of racial discrimination in the selection of jurors simply does not disappear when the defendant is of

a different race. Goldwasser, *Limiting A Criminal Defendant's Use Of Peremptory Challenges: On Symmetry And The Jury In A Criminal Trial*, 102 HARV. L. REV. 808, 835 (1989). Thus, the rule of *Batson* cannot be limited to black defendants, as the Ohio Court of Appeals improperly held (J.A. 31), if racial discrimination is to be prevented.

Determining a defendant's standing by the color of his skin only makes sense if one believes that jurors will vote their race rather than their conscience. This illogical premise would lead to the conclusion that a white defendant's chances for acquittal would only be helped by an all white jury. To state this proposition is to recognize immediately the absurdity of it. That is why it is totally inappropriate to base standing on racial stereotypes. Jurors and defendants must be recognized as individuals. Their rights cannot be determined by their skin color. As this Court stated in *Ristaino* v. *Ross*, 424 U.S. 589, 596 n. 8 (1976):

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that justice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion.

When racial discrimination occurs in jury selection, the harm suffered by the white defendant is the same as that suffered by the black defendant; he has been convicted by a jury chosen as the result of invidious racial discrimination. In order to protect his right to a jury that has been selected without regard to race, a white defendant must be granted the same standing as that granted a black defendant.

III. THE PROSECUTION'S REMOVAL, THROUGH PEREMPTORY CHALLENGES, OF BLACK PROSPECTIVE JURORS ON ACCOUNT OF THEIR RACE DENIES THOSE JURORS THEIR RIGHT TO PARTICIPATE IN THE ADMINISTRATION OF JUSTICE AND DENIES THEM EQUAL PROTECTION OF THE LAW.

The defendant in a criminal case is not the only person with a cognizable interest in nondiscriminatory jury selection. Prospective jurors who are excluded from the jury because of their race are likewise denied their Fourteenth Amendment rights. *Carter* v. *Jury Commission of Greene County*, 396 U.S. at 329.

This Court's decision in *Batson* focused strongly on the interest of the jurors excluded from the petit jury on account of their race:

> While we respect the views expressed in Justice Marshall's concurring opinion concerning [his lack of confidence in] prosecutorial and judicial enforcement of our holding today, we do not share them. *The standard we adopt under the federal constitution is designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race.*

476 U.S. at 99 n. 22 (bracketed language and emphasis added).

Strauder v. *West Virginia*, 100 U.S. at 304, involved a black defendant who was denied equal protection when tried by a jury from which blacks were excluded. But *Strauder* by its own terms comprehends more than simply equal protection for black criminal defendants. As stated by Justice Powell for the *Batson* majority:

> In *Strauder*, the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to government discrimination

> on account of race. [100 U.S.] at 306-07, 25 L. Ed. 664. *Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.*

476 U.S. at 85 (emphasis added).

A member of the community has the right not to be assumed incompetent for and be excluded from jury service on account of his race. *Holland* v. *Illinois*, ___ U.S. ___, 110 S. Ct. at 813 (Marshall, J., dissenting). A person's competence to serve as a juror depends on his or her individual qualifications and impartiality to consider the evidence presented at trial. *Batson*, 476 U.S. at 87, citing *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223-24 (1946). Jurors should be selected, not on the basis of race, but on the basis of their individual qualifications. *Cassell* v. *Texas*, 339 U.S. at 286. A prospective juror's race is unrelated to his fitness to serve on the petit jury. *Batson*, 476 U.S. at 87, citing *Thiel* v. *Southern Pacific Co.*, 328 U.S. at 227 (Frankfurter, J., dissenting).

State action which denies a black person the right to participate in the administration of justice, on account of that person's race, is a denial of equal protection under the Fourteenth Amendment. A prosecuting attorney is clearly an agent of the State; his exercise of peremptory challenges constitutes State action. *Swain* v. *Alabama*, 380 U.S. 202, 203-04 (1965). "Whenever a state uses racial criteria as a basis for government action in a context in which race seems irrelevant an equal protection issue arises." *The Defendant's Challenge To A Racial Criterion In Jury Selection: A Study In Standing, Due Process And Equal Protection*, 74 YALE, L. J. 919, 925 (1965).

Despite the fact that Petitioner Powers is white and the excluded jurors were black, Powers has standing to assert the Fourteenth Amendment rights of those jurors. *Holland*, ___ U.S. ___, 110 S. Ct. at 812 (Kennedy, J., concurring); *id.* at 814 (Marshall, J., dissenting); *id.* at 822 (Stevens, J., dissenting).

The defendant in a criminal case is in the best position to remedy the prosecutor's racially discriminatory use of peremptory challenges. The defendant has standing to raise the interests of the excluded jurors due to his sufficiently concrete interest in the outcome of the case and because he is the proper proponent of the particular legal rights on which his appeal is based. *See Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976) (physicians who provided nonmedically indicated abortions to needy women were granted standing to challenge state law which denied Medicaid reimbursements to the physicians). As demonstrated in the preceding section of this brief, a criminal defendant has a definite interest, secured by the Fourteenth Amendment, in having his guilt or innocence determined by a jury that has been selected without racial considerations. Being tried before a jury which has been chosen along racial lines creates, for the defendant, an "injury in fact." *Id.* at 112.

In the instant case, Powers has standing because he, himself, has been injured by the prosecutor's racially discriminatory actions. *See Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). The need to protect Powers' fundamental rights outweighs any general rules of practice which might deny him standing. *Id.* at 257.

In *Barrows*, *id.* at 257, this Court held that a white person had standing to assert the equal protection rights of nonwhites who were not parties to the litigation. The case involved a covenant on real estate which restricted the use and occupancy of the land to white persons only. The white respondent sold her real property to a non-

white purchaser and, in turn, permitted nonwhites to occupy the premises. The petitioners in *Barrows*, most of whom were signers of the covenant, sued respondent for damages. This Court held that the white respondent had standing to challenge the enforcement of the covenant because the covenant would cause her a direct injury, *id.* at 256, and because she was the only effective adversary of the unenforceable covenant. *Id.* at 259. The Court noted that the nonwhite purchasers and potential purchasers were not identified in the record; however, the Court held that the white respondent had standing to challenge the covenant in order to vindicate the interests of those third parties and to provide them equal protection of the law. *Id.* at 257. *See also Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-46 (1972); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

Similarly, Powers has standing in this case to assert the excluded jurors' claims because he is the proper proponent of those claims. This is due to three (3) factors. First among these is his substantial relationship to those jurors. It is clear that Powers' objections to the prosecutor's peremptory challenges are "inextricably bound" with the excluded jurors' rights to participate in the justice system. *Singleton*, 428 U.S. at 115; *Holland*, ___ U.S. ___, 110 S. Ct. at 812 (Kennedy, J., concurring). Powers is as effective a proponent of the excluded jurors' rights as they, themselves, would be. *Singleton*, 428 U.S. at 115.

The second factor is the existence of genuine obstacles which hinder the jurors from asserting their own rights. *Id.* at 116. As Justice Kennedy stated in his concurring opinion in *Holland*, ___ U.S. ___, 110 S. Ct. at 812, the excluded jurors are unlikely to challenge their removal by

way of civil suit or other protest. Indeed, the excluded jurors may be unaware that they have been challenged for racial reasons. A prosecutor's racial motives, difficult in most circumstances to prove, may not become apparent until a "pattern" of strikes against black jurors develops. *See Batson*, 476 U.S. at 97. Those excluded jurors who do perceive the racial prejudice usually leave the courthouse with a lasting sense of exclusion and unaware of the civil remedies available to them. *Holland*, ___ U.S. ___, 110 S. Ct. at 812 (Kennedy, J., concurring). Civil suits, generally filed as class actions, are expensive, time consuming, and seldom pursued. *Rose* v. *Mitchell*, 443 U.S. 545, 558 (1979).

Regardless of alternative remedies, a challenge brought by the convicted defendant is the primary avenue by which Fourteenth Amendment rights are vindicated. *Id.* Reversal of the defendant's conviction is usually the only effective method of prohibiting the State from practicing racial discrimination in the jury selection process. *Vasquez* v. *Hillery*, 474 U.S. 254, 262 n. 5 (1986).

The third factor is the impact that this litigation will have on third-party interests. *Singleton*, 428 U.S. at 113-18; *Craig* v. *Boren*, 429 U.S. 190, 196 (1976). The class of potential jurors, and the community as a whole, will benefit from Powers' being granted standing to assert the rights of the excluded jurors. By setting aside criminal convictions in cases where racial discrimination has existed in the jury selection process, this Court may make such discrimination a thing of the past. *Vasquez*, 474 U.S. at 262. Because the harm suffered by the excluded jurors is the same regardless of the race of the defendant, all defendants should have equal standing to protest the State's racially discriminatory use of peremptory challenges.

Having satisfied all three of the aforementioned factors, Petitioner Powers has clearly established himself as the proper proponent of the excluded jurors' rights.[1]

IV. THE REMOVAL FROM THE JURY OF PROSPECTIVE JURORS ON ACCOUNT OF THEIR RACE DESTROYS PUBLIC CONFIDENCE IN THE FAIRNESS OF OUR JUSTICE SYSTEM.

A prosecutor's racially motivated use of peremptory challenges harms the defendant, the excluded jurors, and the entire community. *Batson*, 476 U.S. at 85-87. Public confidence in the fairness of the system of justice is vital to a democratic society. *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). State actions which deny participation in that system to distinct members of the community, on account of race, erode public confidence in the fairness of the system. *Batson*, 476 U.S. at 87; *Taylor* v. *Louisiana*, 419 U.S. at 530. Racial discrimination in the judicial system is most harmful because it can stimulate and perpetuate the race prejudice which impedes blacks from obtaining equal justice. *Batson*, 476 U.S. at 87-88; *Strauder*, 100 U.S. at 308.

The importance of a trial by a jury, selected without regard to race, is crucial to the criminal defendant, as well as to the administration of justice. The jury serves to protect the defendant's life and liberty from racial prejudice. *McCleskey*, 481 U.S. at 309-10, citing *Ex parte Milligan*, 4 Wall. 2, 123; *Strauder*, 100 U.S. at 309.

---

[1] This Court has recently held that third-party standing can be established even when the litigant satisfies only two of the three factors. *See Caplin and Drysdale, Chartered* v. *United States*, ___ U.S. ___, 109 S. Ct. 2646, 2651 n. 3 (1989).

A jury system that discriminates against defendants and potential jurors on the basis of those jurors' race cannot pass constitutional muster. *Peters* v. *Kiff*, 407 U.S. at 505. Our democratic ideals of justice and fairness are totally antithetical to the State's using its peremptory challenges in a racially discriminatory manner. The damage done to the criminal justice system and society's perception of that system is the same, regardless of the defendant's race. Neither whites nor blacks, nor members of any other distinct racial group, will have faith in a system that discriminates on the basis of skin color. Racially motivated peremptory challenges destroy the public's perception that our justice system is a fair one. *Holland* v. *Illinois*, ___ U.S. ___, 110 S. Ct. at 816-17 (Marshall, J., dissenting).

As Justice Blackmun wrote in *Rose* v. *Mitchell*, 443 U.S. 545:

> Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, or any group otherwise qualified to serve, impairs the confidence of the public in the administration of justice. * * * The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

Id. at 555-56, quoting *Ballard* v. *United States*, 329 U.S. at 195.

This Court has engaged in "unceasing efforts to eradicate racial prejudice from the criminal justice system." *McCleskey* v. *Kemp*, 481 U.S. at 309. The Court has repeatedly upheld the principle that grand and petit juries must be selected by procedures that are not racially discriminatory. *Batson*, 476 U.S. at 88. Petitioner Powers' position is consistent with that principle. The position that a criminal defendant has standing, regardless of his race or the race of the excluded jurors, to object when the State excludes those jurors on account of their race is also consistent with the principles of equal protection. What is *not* consistent with the principles of racial equality and equal protection is the position taken by the Ohio courts in the instant case. That position discriminates against Powers and other defendants similarly situated. It says that because a defendant is white, he or she cannot object to the racially discriminatory exclusion of black jurors from the petit jury.

The Ohio Court of Appeals would allow a black defendant to make such an objection under *Batson* v. *Kentucky*, but would deny the same right to object to a white defendant. That is clearly an unjustifiable and unreasonable distinction drawn by the Ohio courts based purely on the race of the defendants. That type of racial discrimination is repugnant to the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U.S. at 307. Equal protection emphasizes the central aim of our entire judicial system—that all persons charged with crimes must stand on equal ground before the court. *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956). The defendant in *Batson* was permitted to raise not only his rights, but also those of the excluded jurors and of the general public; there is no reason why a white defendant cannot do so as well. *Holland*, ___ U.S. ___, 110 S. Ct. at 814 (Marshall, J., dissenting). Denying the white defendant the opportunity to object to the removal of blacks from his petit jury clearly denies him equal protection.

Jury selection procedures that discriminate against a specific race do damage to the public's confidence in the justice system, even where there are members of that race on the final jury. The constitutional prohibition against racial discrimination does not require the presence of blacks on a jury, but it is not satisfied by racial representation which has been arbitrarily limited. The Constitution commands that the jury selection process not consciously take race into account. *Cassell* v. *Texas*, 339 U.S. at 295 (Frankfurter, J., concurring).

Contrary to the holding of the Franklin County, Ohio Court of Appeals (J.A. 31-33), it does not matter whether Larry Joe Powers was tried before an all white jury or a jury that included black members. The damage is done by the discriminatory process, regardless of the racial composition of the jury that returned the verdict.

Where racial discrimination exists in the jury selection process, the public's perception of the fairness of the justice system is damaged, regardless of the defendant's ability or inability to show actual harm to himself. *Peters*, 407 U.S. at 502-03. For this reason this Court has repeatedly required the reversal of criminal convictions where members of a racial group have been improperly excluded from jury service, without inquiry into whether the defendant was prejudiced in fact by the racial discrimination. *Rose*, 443 U.S. at 557-58; *Whitus* v. *Georgia*, 385 U.S. 545, 549-50 (1967).

This Court should complete the task it began in *Batson* v. *Kentucky*, 476 U.S. 79-the elimination of racial discrimination in the exercise of peremptory challenges. In order to do so, this Court must grant Powers and all other

defendants, regardless of race, standing to object to such discrimination.

Inscribed on the exterior of the edifice of this Honorable Court are the words "Equal Justice Under Law." If those words are to have any meaning, "equal protection to all must be given-not merely promised." *Smith* v. *Texas*, 311 U.S. at 130.

CONCLUSION

For the foregoing reasons, Petitioner Larry Joe Powers requests that the judgment of the Franklin County, Ohio Court of Appeals be reversed and his case remanded to the trial court for further proceedings consistent with *Batson* v. *Kentucky*, 476 U.S. at 100.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

GREGORY L. AYERS
Chief Counsel

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: 614/466-5394
Counsel for Petitioner

APPENDIX

APPENDIX

OHIO REVISED CODE

CHAPTER 2903: HOMICIDE AND ASSAULT

HOMICIDE

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to

commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

OHIO REVISED CODE

HOMICIDE

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

OHIO REVISED CODE

§ 2923.02. Attempt.

(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of and offense, shall engage in conduct which, if successful, would constitute or result in the offense.

(B) It is no defense to a charge under this section that, it retrospect, commission of the offense which was the object of the attempt was impossible under the circumstances.

(C) No person who is convicted of committing a specific offense, or of conspiracy to commit such offense, shall be convicted of an attempt to commit the same offense in violation of this section.

(D) It is an affirmative defense to a charge under this section that the actor abandoned his effort to commit

the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(E) Whoever violates this section is guilty of an attempt to commit an offense. An attempt to commit aggravated murder or murder is a felony of the first degree. An attempt to commit an aggravated felony of the first or second degree is an aggravated felony of the next lesser aggravated degree than the aggravated felony attempted. An attempt to commit any other offense is an offense of the next lesser degree than the offense is an offense of the next lesser degree than the offense attempted. In the case of an attempt to commit an offense other than a violation of Chapter 3734. of the Revised Code that is not specifically classified, an attempt is a misdemeanor of the first degree if the offense attempted is a felony, and a misdemeanor of the fourth degree if the offense attempted is a misdemeanor. In the case of an attempt to commit a violation of any provision of Chapter 3734. of the Revised Code, other than section 3734.18 of the Revised Code, that relates to hazardous wastes, an attempt is a felony punishable by a fine of not more than twenty-five thousand dollars or imprisonment for not more than eighteen months, or both. An attempt to commit a minor misdemeanor, or to engage in conspiracy, is not an offense under this section.

OHIO REVISED CODE

CHAPTER 2929: PENALTIES AND SENTENCING

[FIREARM OFFENSES]

§ 2929.71 [Additional three years of actual incarceration for offenses involving a firearm.]

(A) The court shall impose a term of actual incarceration of three years in addition to imposing a life sentence pursuant to section 2907.02, 2907.12, or 2929.02 of the Revised Code or an indefinite term of imprisonment pursuant to section 2929.11 of the Revised Code, if both of the following apply:

(1) The offender is convicted of, or pleads guilty to, any felony other than a violation of section 2923.12 of the Revised Code;

(2) The offender is also convicted of, or pleads guilty to, a specification charging him with having a firearm on or about his person or under his control while committing the felony. The three-year term of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to, the life sentence or the indefinite term of imprisonment.

(B) If an offender is convicted of, or pleads guilty to, two or more felonies and two or more specifications charging him with having a firearm on or about his person or under his control while committing the felonies, each of the three-year terms of actual incarceration imposed pursuant to this section shall be served consecutively with, and prior to the life sentences or indefinite terms of imprisonment imposed pursuant to sections 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code, unless any of the felonies were committed as part of the same act or transaction. If any of the felonies were committed as part of the same act or transaction, only one three-year term of actual incarceration shall be imposed for those offenses, which three-year term shall be served consecutively with, and prior to, the life sentences or indefinite terms of imprisonment imposed pursuant to section 2907.02, 2907.12, 2929.02, or 2929.11 of the Revised Code.

(C) No person shall be sentenced pursuant to division (A) of this section unless the indictment, count in the indictment, or information charging him with the offense contains a specification as set forth in section 2941.141 [2941.14.1] of the Revised Code.

(1) "Firearm" has the same meaning as in section 2923.11 of the Revised Code;

(2) "Actual incarceration" has the same meaning as in division (C) of section 2929.01 of the Revised Code, except that a term of actual incarceration imposed pursuant to this section shall not be diminished pursuant to section 2967.19 of the Revised Code.

UNITED STATES CODE

TITLE 18: CRIMES

18 § 243. Exclusion of jurors on account of race or color.

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

RESPONDENT'S

BRIEF

(6)

No. 89-5011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY JOE POWERS,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE TENTH DISTRICT COURT OF APPEALS, FRANKLIN COUNTY, OHIO

BRIEF FOR RESPONDENT

MICHAEL MILLER
Prosecuting Attorney
Franklin County, Ohio

ALAN CRAIG TRAVIS
Counsel of Record
Chief Counsel, Appellate Division
369 South High Street
Columbus, Ohio 43215
614-462-3555

Counsel for Respondent

MIDWEST LAW PRINTERS • P.O. Box 856 • Grove City, Ohio 43123

36 pH

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A DEFENDANT OF ONE RACE HAVE STANDING TO CHALLENGE THE REMOVAL BY PEREMPTORY CHALLENGE OF MEMBERS OF ANOTHER COGNIZABLE RACIAL GROUP?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES *Page*

No. 89-5011

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LARRY JOE POWERS, Petitioner.

v.

STATE OF OHIO, Respondent.

ON WRIT OF CERTIORARI TO THE TENTH DISTRICT COURT OF APPEALS, FRANKLIN COUNTY, OHIO

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Petitioner Larry Joe Powers was charged by Grand Jury indictment with two counts of aggravated murder in the slayings of Gary Golden and Thomas Kicas. Powers was charged with a third count of attempted aggravated

murder in his unsuccessful attempt to murder Golden's former wife, Charlotte. Charlotte Golden survived and testified at Powers' trial. Powers and both decedents met at a local tavern in Columbus, Ohio, then returned to the home of Gary and Charlotte Golden. Powers produced a pistol. When asked why he had the gun, Powers said: "Maybe I am a hit man." When he was asked to put the gun away, Powers shot and killed Gary Golden. Powers then turned to Kicas, said, "You're dead," and fatally shot him. Powers addressed Charlotte Golden in the same fashion, then fired several shots at Charlotte as she fled from the home. At trial, Powers admitted killing Gary Golden but claimed he did so in self-defense. Powers said he shot Kicas because he did not know what Kicas would do after he killed Golden. Powers denied shooting at Charlotte Golden.

During jury selection, Powers objected when the state exercised its first peremptory challenge to remove a black venireman. Thereafter, Powers objected to each peremptory challenge involving a black prospective juror. (J.A. 4-11) Ultimately, the state exercised ten of twelve peremptory challenges authorized by state statute.[1] Seven of those excused peremptorily were black. At the conclusion of jury selection, Powers expressed satisfaction with the jury as empaneled. (J.A. 11)On appeal, Powers relied on both the Sixth and Fourteenth Amendments in claiming error in the jury selection process. (J.A. 16-17) The Ohio Court of Appeals held that it is "only when . . . a necessary inference of purposeful discrimination has been established that the state is required to explain or justify its use of peremptory challenges of prospective black

[1] Subsequently, the Ohio Supreme Court ruled that the number of challenges was governed by a procedural rule. Each party is permitted six peremptory challenges in a capital case, four in all other felony cases and three in misdemeanor cases. *State* v. *Greer,* 39 Ohio St. 3d 236, 530 N.E. 2d 382 (1988).

jurors." (J.A. 30) The appellate court found no basis to extend *Batson* v. *Kentucky,* 476 U.S. 79 (1986) to permit a defendant with membership in one class to object to peremptory removal of prospective jurors of another class. (J.A. 31) In addition, Powers failed to demonstrate the final racial make up of the jury which heard Powers' case. (J.A. 31-32) The Court of Appeals concluded that for a white defendant to object to the peremptory challenge of a black venireman, the white detendant must demonstrate some form of prejudice to his case. (J. A. 33-34) The Ohio Supreme Court declined further review. Powers sought certiorari which was granted on February 20, 1990.

SUMMARY OF ARGUMENT

As a member of one identifiable group, Powers lacks standing to object to the exclusion by peremptory challenge of members of another identifiable group from the petit jury which convicted him. In each of this Court's precedents in which an equal protection clause challenge has been involved, there has been a correlation between the group identification of the defendant and the group identification of the of the excluded jurors. That correlation is not present herein.

Irregardless of whether Powers is found to have standing to litigate his equal protection claim, *Batson* v. *Kentucky,* 476 U.S. 79 (1986) should be applied with equal force to both the state and the defendant. There is sufficient state action involved in providing, governing, and enforcing the peremptory challenge to find its race-based use by the defense violative of the Fourteenth Amendment.

ARGUMENT

I. TO HAVE STANDING TO RAISE AN EQUAL PROTECTION CLAIM THAT MEMBERS OF AN IDENTIFIABLE GROUP HAVE BEEN EXCLUDED FROM A PETIT JURY, A DEFENDANT MUST BELONG TO THE SAME IDENTIFIABLE GROUP AS THE EXCLUDED JURORS. PETITIONER LACKS STANDING TO ASSERT HIS EQUAL PROTECTION CLAIM.

In addressing the question of a litigant's right to have a court decide the merits of a particular issue, the proper inquiry focuses on both constitutional limits on federal court jurisdiction and prudential limitations on the exercise thereof. *Warth* v. *Seldin,* 422 U.S. 490 (1975). The term "standing" includes both requirements. *Id.* "At an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant. . . .'" *Valley Forge Christian College* v. *Americans for Separation of Church and State,* 454 U.S. 464, 471 (1982).

The case-or-controversy doctrines of Article III of the Constitution present fundamental limits on federal judicial power and define, with respect to the Judicial Branch, the concept of separation of powers. *Allen* v. *Wright,* 468 U.S. 737, 750 (1984). Both as a constitutional as well as a prudential limitation, standing is based on "concern about the proper—and properly limited—role of the courts in a democratic society." *Warth* v. *Seldin,* 422 U.S. at 498.

Under certain circumstances, this Court has recognized that a party may have standing to vindicate the constitutional rights of others. See *Singleton* v. *Wulff,* 428 U.S. 106, 114-115 (1976). To have standing under the doctrine of ***jus tertii,*** the litigant must have a significant relation-

ship to the person whose right he seeks to assert. That right must be inextricably bound with the activity the litigant wishes to pursue, and the litigant must be fully or very nearly as effective an advocate for the issue as the third party. *Id.* An additional factor is the ability of the third party to assert his own right.

In all cases, however, the litigant must demonstrate that he has suffered actual injury;

> "The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."
> *Allen* v. *Wright,* 468 U.S. 737, 751 (1984).

The litigant "must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin,* 422 U.S. at 501.

The requirement of actual injury to the party seeking review insures that the legal questions will be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College,* 454 U.S. at 472. Merely because the claimed harm is a "generalized grievance" shared by a large class of citizens does not, without more, warrant the exercise of jurisdiction. *Warth* v. *Seldin,* 422 U.S. at 499. The requirement of standing focuses on the party seeking review, not on the merits of the issues he wishes to have adjudicated. *Valley Forge Christian College, supra.*

His Sixth Amendment claim now foreclosed by *Holland* v. *Illinois,* _____ U.S. _____ , 110 S. Ct. 803 (1990), Powers seeks to apply the Equal Protection Clause ruling of *Batson* v. *Kentucky,* 476 U.S. 79 (1986) to his circumstances. Powers, a white defendant, argues that his rights under the Equal Protection Clause of the Fourteenth Amendment were violated by the exercise of peremptory challenges to exclude black jurors from the petit jury which convicted petitioner of two homicides and one attempted homicide. By all precedents of this Court, Powers lacks standing to raise his equal protection claim.

Powers, of course, had standing to raise his claim under the Sixth Amendment as fair cross-section analysis has no rule that such claims may be made only by those defendants who are members of the group excluded from jury service. *Holland* v. *Illinois,* 110 S. Ct. at 805; *Duren* v. *Missouri,* 439 U.S. 357 (1979); *Taylor* v. *Louisiana,* 419 U.S. 522, 526 (1975). However, fair cross-section analysis differs from equal protection principles. The Sixth Amendment guarantee of jury impartiality requires that the venire from which the petit jury is selected be from a fair cross-section of the community. To exclude identifiable groups from the venire reduces the possibility that the petit jury ultimately drawn will have come from a representative cross-section of the community. See *Taylor* v. *Louisiana,* 419 U.S. at 530-531.

> "The Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a **representative** jury (which the Constitution does not demand), but an **impartial** one (which it does)."
> *Holland* v. *Illinois,* 110 S. Ct. at 807.

Accordingly, this Court has consistently held that a defendant need not be a member of the excluded group to raise a Sixth Amendment claim.

Equal protection analysis, however, has focused on the injury to the defendant when he is indicted or tried by a jury from which members of his identifiable group have been systematically excluded. Since *Strauder* v. *West Virginia,* 10 Otto 303, 100 U.S. 300 (1880), this Court consistently has recognized that purposeful denial "on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain* v.

Alabama, 380 U.S. 202, 203-204 (1965). In each of this Court's precedents where an equal protection violation was found, the defendant was of the same identifiable group as those persons excluded from the grand or petit jury.[2] For example, *Batson* v. *Kentucky*, 476 U.S. 79 (1986) recognized, using equal protection analysis, that to establish a ***prima facie*** case of discriminatory selection of the petit jury before which he will be tried,

> "the defendant first must show that he is a member of a cognizable racial group, *Castaneda* v. *Partida* 430 U.S. [492 (1977)] at 494 and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Batson*, 476 U.S. at 96.

That correlation has been consistently present in decisions employing equal protection analysis and was mentioned in the opinion announcing *Holland* v. *Illinois*, ____ U.S. ____, 110 S. Ct. 803, 805 (1990).[3]

---

[2] See, e.g., *Strauder* v. *West Virginia, supra; Neal* v. *Delaware*, 13 Otto 370, 103 U.S. 370 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935) ***(per curiam)***; *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967) ***(per curiam)***; *Carter* v. *Jury Comm'n of Greene County*, 396 U.S. 320 (1970); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Rose* v. *Mitchell*, 443 U.S. 545 (1979); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986).

[3] The Ohio Court of Appeals is not alone in the belief that equal protection analysis requires a correlation between the group identification of the defendant and group identification of excluded venire members. A number of federal courts have relied on the specific language of *Batson* or earlier cases to conclude that a predicate of standing is that the defendant is a member of the same group as that excluded. See *United States* v. *Angiulo*, 847 F. 2d 956 (C.A. 1, 1988); *United States* v. *Ruiz*, 894 F. 2d 501 (C.A. 2, 1990); *Ford* v. *Seabold*, 841 F. 2d 677 (C.A. 6, 1988); *United States* v. *Townsley*, 856 F. 2d 1187 (C.A. 8, 1988), ***en banc***; *United States* v. *Vaccaro*, 816 F. 2d 443 (C.A. 9, 1987); *United States* v. *Rodriguez-Cardenas*, 866 F. 2d 390 (C.A. 11, 1989). Of course, respondent is not unmindful of the concurring and dissenting opinions in *Holland*, 110 S. Ct. at 811, Kennedy J., concurring, at 813-814, Marshall, J., dissenting, and at 821, Stevens, J., dissenting.

Where correlation between group identification of the defendant and group identification of the excluded venire members was held to be unnecessary for standing, each case was decided on constitutional or statutory provisions other than the Equal Protection Clause. See *Holland* v. *Illinois, supra; Taylor* v. *Louisiana, supra;* and *Duren* v. *Missouri, supra*, all involving Sixth Amendment claims. In *Peters* v. *Kiff*, 407 U.S. 493 (1972), six justices concurred in judgment. Three justices joined the lead opinion which specified that the holding was on Due Process grounds. 407 U.S. at 504.[4] Three additional justices concurred in judgment but on the narrower statutory grounds also raised by the defendant, 18 U.S.C. §243. 407 U.S. at 506-507.[5] Due process was also the basis upon which a white defendant objected to exclusion of blacks and women from the position of grand jury foreman in

---

[4] The dissent also noted that the lead opinion "refrains from relying on the equal Protection Clause . . . ." 407 U.S. at 509, Burger, C.J., dissenting.

[5] ***Amicus***, the Criminal Justice Legal Foundation, correctly notes that under *Marks* v. *United States*, 430 U.S. 188 (1977), when a fragmented Court decides a case and no single rationale for the result is joined by five justices, the holding should be viewed as the position taken by those justices who concurred on the narrowest grounds. Brief ***Amicus***, at 6. In *Peters*, the defendant raised both the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as 18 U.S.C. §243. See 407 U.S. at 494, 497. Ultimately, the decision was based on the Due Process Clause and on statutory grounds. 407 U.S. at 497. Unlike *Peters*, the petitioner herein did not base his claim either on the Due Process Clause or 18 U.S.C. §243.

Hobby v. *United States,* 468 U.S. 339 (1984). Distinguishing *Rose* v. *Mitchell,* 443 U.S. 545 (1979), this Court noted the correlation between Rose and excluded jurors in that case:

> "*Rose* involved a claim brought by two Negro defendants under the Equal Protection Clause. As members of the class allegedly excluded from service as grand jury foremen, the *Rose* defendants had suffered the injuries of stigmatization and prejudice associated with racial discrimination.
>
> * * *
>
> Petitioner, however, has alleged only that the exclusion of women and Negroes from the position of grand jury foreman violates his right to fundamental fairness under the Due Process Clause. As we have noted, discrimination in the selection of federal grand jury foremen cannot be said to have a significant impact upon the due process interests of criminal defendants. Thus, the nature of petitioner's alleged injury and the constitutional basis of his claim distinguish his circumstances from those of the defendants in *Rose*." 468 U.S. at 347.

Powers, however, did not bring his claim under the Due Process Clause or seek relief under 18 U.S.C. §243. Thus neither *Peters* nor *Hobby, supra,* support Powers' claim to standing under the theory upon which he first raised his federal claim, the Equal Protection Clause.

Correlation between the group identity of a defendant and the group excluded from a grand or petit jury is consistent with the core values of the Equal Protection Clause and principles of standing. At an "irreducible minimum," a party who invokes the court's authority must demonstrate that he personally has suffered an actual or threatened injury. *Valley Forge Christian College, supra.* Thus, even though there may be a "generalized

grievance" shared by a class of citizens, without more, a party does not have standing to invoke the jurisdiction of the court. *Warth* v. *Seldin, supra.* Under these well-settled principles, Powers lacks standing under the Equal Protection clause to assert the claims of a group of which he is not a member.

II. THE RULE OF *BATSON* V. *KENTUCKY,* 476 U.S. 79 (1986) SHOULD APPLY WITH EQUAL FORCE TO BOTH THE STATE AND THE DEFENDANT.

Irregardless of the final determination of Powers' standing to raise an equal protection claim, the decision of *Batson* v. *Kentucky,* 476 U.S. 79 (1986) should apply with equal vigor to the discriminatory exercise of peremptory challenges by defense and prosecution alike. The historic role of the peremptory challenge in the selection of a fair and impartial jury has been well documented. "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Swain* v. *Alabama,* 380 U.S. 202, 219 (1965). While the peremptory challenge is not constitutionally grounded, it is "one of the most important of the rights secured to the accused." *Pointer* v. *United States,* 151 U.S. 396, 408 (1894). "Denial or impairment of the right is reversible error without a showing of prejudice." *Lewis* v. *United States,* 146 U.S. 370, 376 (1892). The historic trial practice "long has served the selection of an impartial jury . . . ." *Batson* v. *Kentucky,* 476 U.S. 79, 99, n. 22. The importance of the peremptory challenge in the jury selection process is such that to some, it has gained a quasi-constitutional status. See Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 549-558 (1975).

In overruling *Swain* v. *Alabama, supra, Batson* applied to petit jury selection principles of venire selection first

discussed in *Strauder* v. *West Virginia,* 10 Otto 303, 100 U.S. 303 (1880). Repeatedly, this Court has held that a state's purposeful or deliberate denial of participation in the administration of justice on account of race violates the Equal Protection Clause. *Swain, supra,* 380 U.S. at 204. *Batson* reaffirmed that principle but expressly left unresolved the question of whether a defendant's equally offensive, race-based exercise of peremptory challenges would be subject to the same strictures. See 476 U.S. 79 at 82 n. 12.

Former Chief Justice Burger anticipated the emergence of that issue in his dissent in *Batson.* "Once the Court has held that **prosecutors** are limited in their use of peremptory challenges, could we rationally hold that defendants are not?" 476 U.S. at 126. Concurring, Justice Marshall rejected as "unacceptable" a system which would ban the prosecutor's peremptory challenge but preserve that of the defendant. "Our criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " 476 U.S. at 107, quoting *Hayes* v. *Missouri,* 120 U.S. 68, 70 (1887). While some suggest the defense should be free to discriminate on racial grounds, see Note: *Defendant's Discriminatory Use of the Peremptory Challenge after Batson v. Kentucky,* 62 St. John's L. Rev. 46 (1987), to permit such discrimination would not serve the concerns enunciated in *Batson.* See Note, *Discrimination by the Defense: Peremptory Challenges after Batson v. Kentucky,* 88 Colum. L. Rev. 355 (1988)

Writing for the majority in *Batson,* Justice Powell identified three classes or groups aggrieved by the use of race-based peremptory challenges. First, a defendant is denied equal protection of the law when the state peremptorily removes members of the defendant's race from the jury for racial reasons. 476 U.S. at 86. Second, the excluded juror suffers a denial of equal protection of the law. *Id.* at 87. Third, society is damaged because selection procedures which purposefully exclude prospective jurors from service on racial grounds "undermine public confidence in the fairness of our system of justice." *Id.*

If only the defendant's equal protection right were involved, arguably, *Batson* could be restricted to prosecution challenges. See *Chew* v. *State,* 71 Md. App. 681, 527 A. 2d 332, 337 (1987). However, *Batson* is not based solely on violation of the accused's right. Equally significant are those violations of the equal protection rights of the excluded juror and the harm done to the entire community in the form of undermining public confidence in the fairness of our judicial system.

Equal protection rights vest in those eligible for jury duty as well as in defendants. *Carter* v. *Jury Commission,* 396 U.S. 320 (1970). If the discriminatory exercise of peremptory challenges violates the rights of the excluded juror, then it strains reason to acknowledge the violation when committed by the state but ignore it when committed by the defendant. While discussing the peremptory challenge in the context of the Sixth amendment, an issue now foreclosed by *Holland* v. *Illinois, supra,* the dissent of Judge Meskill in *McCray* v. *Abrams,* 750 F.2d 1113, 1138-1139, n.4, (C.A.2, 1984), is illuminating. It is manifestly unjust to recognize that race-based peremptory challenges are an evil to be condemned but permit them to be exercised by the defendant.

> "It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges . . . [a]s it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law abiding community represented by the prosecutor. . . ."
> *United States* v. *Clark,* 737 F. 2d 679, 682 (C.A. 7, 1984).

Public confidence in the fairness of our judicial system necessarily will be eroded if racial discrimination practiced by a defendant is given the imprimatur of the judiciary.

> "The spectacle of a defense counsel systematically excusing potential jurors because of their race or other shared group identity while the prosecutor and trial judge were constrained merely to observe, could only impair the public's confidence in the integrity and impartiality of the resulting jury."
> *Booker* v. *Jabe*, 775 F. 2d 762, 772 (C.A. 6, 1985), *cert. denied*, 479 U.S. 1046.[6]

If the spirit of *Batson* is to have any meaning, it must be applied with equal vigor to both parties.

That defendants exercise peremptory challenges in a discriminatory fashion should come as no surprise. See *Booker* v. *Jabe*, 775 F. 2d at 764; *People* v. *Gary M.*, 138 Misc. 2d 1081, 526 N.Y.S. 2d 986 (Sup. Ct. 1988); *People* v. *Kern*, 545 N.Y.S. 2d 4 (A.D. 2d Dept. 1989), *aff'd*, 47 CrL. 1021 (March 29, 1990); *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978). Defendants have at least as much reason to discriminate as do prosecutors.[7]

People v. *Kern*, *supra*, involved the prosecution of several white defendants for the death of a black man and the severe beating of his companion. The "Howard Beach incident" drew not only public attention but exacerbated existing racial tensions. The New York trial

---

[6] As with *McCray* v. *Abrams*, *supra*, *Booker* v. *Jabe* was based on the principles of the Sixth Amendment. The court's observation should be no less significant under the equal protection analysis of *Batson*. See also *United States* v. *Leslie*, 783 F2d. 541 at 565 (C.A.5, 1986)

[7] The State observed below that Powers had systematically used his peremptory challenges to remove all white persons from the jury panel. (J.A. P. 8)

court found the defense had exercised its peremptory challenges to remove black jurors in a racially discriminatory manner. While the intermediate appellate court found the issue moot due to the ultimate make-up of the jury (all white), the court found the question to be a recurring one, evading review, and went on to decide the issue. 545 N.Y.S. 2d at 26.

The New York intermediate appellate court found it significant that *Batson* was premised not only on a violation of the accused's equal protection rights but upon those of the excluded jurors and the community at large. *Id.* at 30. Permitting a defendant to violate the rights of jurors and to undermine public confidence in the fairness of our justice system is unjustified.

Moreover, justice is not served by eliminating race-based jury selection by one party while permitting the opponent to engage in the very practice condemned by this Court. "The 'very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Pennsylvania* v. *Finley*, 491 U.S. 551, 107 S. Ct. 1990, 2000 (1987), Brennan, J. dissenting, quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975). Fair but vigorous representation on both sides is an indispensable ingredient of our system of justice. Truth as well as fairness is promoted by the healthy clash of adversaries. *Penson* v. *Ohio*, ____ U.S. ____, 109 S. Ct. 346, 352 (1988). To unilaterally hobble one side of this process will produce not impartial but biased juries, unsuited to our system of justice.

Before a Fourteenth Amendment remedy for the use of race-based, discriminatory challenges by a defendant may be fashioned, the threshold question of state action must be met. The Equal Protection Clause does not provide that all people shall be free of discrimination but rather that "[n]o state shall . . . deny to any person . . . the equal

protection of the laws." The Fourteenth Amendment does not shield against merely private conduct, however discriminatory or wrongful. *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); see *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345 (1974).

State action is not a bright-line concept. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

Whether private conduct constitutes state action depends in large measure on whether the conduct is "fairly attributable" to the State. *Lugar* v. *Edmondson Oil Co.,* 457 U.S. 922, 937 (1982). Fair attribution requires a two-part approach:

> "First the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . .Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937.

To be a state actor the person need not be a state official. It is sufficient if he "acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* The peremptory challenge provided by Ohio Revised Code Section 2945.21, now by Ohio Criminal Rule 24(C) (see *State* v. *Greer,* 39 Ohio St. 3d 236, 530 N.E. 2d 382, [1988]) is undoubtedly a "right or privilege created by the State". *Lugar, supra,* at 937. Without operation of that state-created right, a litigant is without authority to remove jurors from the panel. The state not only provides the right but is "intimately involved in the jury selection process." *People* v. *Kern,* 545 N.Y.S. 2d at 32.

As in all states, the venire is summoned by a clerk or jury commissioner, ordered to report to a certain area in

the public courthouse, and is subject to questioning by the court and parties. The State not only provides the right but governs the manner and timing of its use. Where a challenge is exercised, it is the court which dismisses the challenged juror.[8] Much more than private action is involved. State action should be found when a court acts to enforce a racially discriminatory act in a judicial setting just as state action exists when a court enforces a racially restrictive covenant in a private deed. See *Shelley* v. *Kraemer, supra,* 334 U.S. 1.

As a representative of the community as a whole, the prosecutor has standing to object to race-based peremptory strikes which exclude community members from jury service. When the prosecutor objects to the improper discharge of a juror, he acts as an agent for the excluded juror. Under the doctrine of ***parens patriae,*** there is an obligation on the State to protect the rights of its citizens. If the constitutional rights of a juror have been violated, the prosecutor has a duty to vindicate the rights of that citizen. Moreover, unlike defense counsel whose singular goal is acquittal of his client, the prosecutor is charged with the responsibility of seeking not merely to convict but to do justice. That goal is not served when members of the community are denied their right to participate in the administration of justice because of their race.

The peremptory challenge serves an important function in criminal trials. An historic trial practice which "long

---

[8] Other factors which support a finding of state action under the circumstances have been listed in *People* v. *Gary M.,* 526 N.Y.S. 2d at 992-993. ***Inter alia,*** the action is by the state in the form of a criminal prosecution and enforcement is by a state officer (judge); the act is in a public courtroom run and operated by the State (see *Burton* v. *Wilmington Parking Authority, supra*); application for enforcement of the racially motivated act is made to the State, which becomes a joint actor. See *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 179 (1974).

has served the selection of an impartial jury . . ." (*Batson*, 476 U.S. at 99 n. 22) should neither be discarded nor unilaterally disallowed. The clash of adversaries striving to achieve an impartial, unbiased jury is a fundamental part of our system of justice. To permit a defendant to exercise race-based peremptory challenges will not serve the jury selection process. Only by applying *Batson* to both litigants will the dynamic equilibrium of our adversarial system continue to produce impartial, unbiased juries and serve the administration of justice.

CONCLUSION

In each case where this Court has examined a racial discrimination claim under equal protection analysis, there has been a correlation between group identification of excluded jurors and the defendant. That correlation is lacking in the instant cause. Powers lacks standing to object to the exercise of peremptory challenges which excluded jurors not of Powers' group identification. On that basis, the judgment below should be affirmed. If, contrary to respondent's submission, the Court should find that Powers has standing to raise an equal protection claim, the case should be remanded to the trial court for further proceedings consistent with *Batson* v. *Kentucky*, 476 U.S. 79, 100 (1986).

Irrespective of resolution of the standing issue, if the core values of *Batson* v. *Kentucky* are to have meaning, *Batson* must be applied to the defendant who discriminates as well as the prosecutor. Racial discrimination in the jury selection process is wrong irrespective of the status of the party to the litigation. Only by applying *Batson* to both parties will the goals of an adversarial system and the even-handed administration of justice be served.

Respectfully submitted,

MICHAEL MILLER
Prosecuting Attorney

ALAN CRAIG TRAVIS
Counsel of Record
Chief Counsel, Appellate Division
369 South High Street
Columbus Ohio 43215
614-462-3555

Counsel for Respondent

APPENDIX

THE CONSTITUTION OF THE UNITED STATES

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compusory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

OHIO RULES OF CRIMINAL PROCEDURE

ANDERSON PUBLISHING CO.

RULE 24. Trial Jurors

(A) Examination of jurors. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(B) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That he has been convicted of a crime which by law renders him disqualified to serve on a jury.

(2) That he is a chronic alcoholic, or drug dependent person.

(3) That he was a member of the grand jury which found the indictment in the case.

(4) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendering a verdict thereon which was set aside.

(5) That he served as a juror in a civil case brought against the defendant for the same act.

(6) That he has an action pending between him and the State of Ohio or the defendant.

(7) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him.

(8) That he has been subpoenaed in good faith as a wit-

ness in the case.

(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trail.

(10) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That he is the person alleged to be injured or attempted to be injured by the offense charge, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in subsection (B)(II).

(13) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and the law in the case.

(14) That he is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this subdivision shall be determined by the court.

(C) Peremptory challenges. In addition to challenges provided in subdivision (B), if there is one defendant, each party peremptorily may challenge three jurors in misdemeanor cases, four jurors in felony cases other than capital cases, and six jurors in capital cases. If there is more than one defendant, each defendant peremptorily

may challenge the same number of jurors as if he were the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations or complaints for trial, such consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information or complaint.

(D) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(E) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to subdivision (A) and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commis-

sioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(F) Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(G) Control of juries

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a

non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

(a) Communicate any matter concerning jury conduct to anyone except the judge or;

(b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

PAGE'S

OHIO REVISED CODE

ANDERSON PUBLISHING CO.

§2945.21 [Peremptory challenges.]

(A)(1) In criminal cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge three of the jurors in misdemeanor cases and four of the jurors in felony cases other than capital cases. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(2) Notwithstanding Criminal Rule 24, in capital cases in which there is only one defendant, each party, in addition to the challenges for cause authorized by law, may peremptorily challenge twelve of the jurors. If there is more than one defendant, each defendant may peremptorily challenge the same number of jurors as if he were the sole defendant.

(3) In any case in which there are multiple defendants, the prosecuting attorney may peremptorily challenge a number of jurors equal to the total number of peremptory challenges allowed to all of the defendants.

(B) If any indictments, informations, or complaints are consolidated for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(C) The exercise of peremptory challenges authorized by this section shall be in accordance with the procedures of Criminal Rule 24.

§2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(A) That he was a member of the grand jury that found the indictment in the case;

(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

(D) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and that jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is a chronic alcoholic, or drug dependent

person;

(I) That he has been convicted of a crime that by law disqualifies him from serving on a jury;

(J) That he has an action pending between him and the state or the defendant;

(K) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(L) That he is the person alleged to be injured or attempted to be injured by the offense charged, or is the person on whose complaint the prosecution was instituted, or the defendant;

(M) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney of any person included in division (L) of this section;

(N) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and law in the case;

(O) That he otherwise is unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this section shall be determined by the court.

REPLY

BRIEF

FOR ARGUMENT

No. 89-5011

In The

Supreme Court of the United States

October Term, 1990

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Writ Of Certiorari To The Tenth District Court Of Appeals, Franklin County, Ohio

REPLY BRIEF FOR PETITIONER

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
(appointed by this Court)
Chief Appellate Counsel
Counsel of Record

GREGORY L. AYERS
Chief Counsel

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: 614/466-5394

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

ARGUMENT

I.

POWERS HAS STANDING TO ASSERT HIS EQUAL PROTECTION CLAIM AND HAS SATISFIED THE REQUIREMENTS OF ARTICLE III DUE TO HIS "PERSONAL STAKE" IN THE OUTCOME OF THE CASE AND HIS ACTUAL INJURY FROM THE PROSECUTION'S USE OF ITS PEREMPTORY CHALLENGES IN A RACIALLY DISCRIMINATORY MANNER.

A. Powers has a "personal stake" in the outcome of this case.

Respondent State of Ohio (hereinafter State) contends that Powers lacks standing to object, under the Equal Protection Clause, to the prosecution's using peremptory challenges to exclude seven (7) black prospective jurors from his jury. Brief for Respondent (hereinafter Br. for Resp.) 7. The State's contentions ignore the fact that Powers presents this Court with a very real "case or controversy" and that he has a "personal stake" in its outcome. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Barrows v. Jackson*, 346 U.S. 249, 256 (1953).

Powers has standing to object to the prosecution's use of peremptory challenges despite the fact that Powers is white and the prospective jurors who were improperly excluded from jury service were black. Standing imports justiciability: whether the aggrieved party has made out a "case or controversy" between himself and the other party within the meaning of Article III of the United States Constitution. *Warth v. Seldin*, 422 U.S. at 498. As an aspect of justiciability, the standing question is whether Powers has alleged a personal stake in the outcome of the

controversy. *Id.* Powers has a personal stake in the outcome of this litigation. He is a defendant whose jury was chosen in a racially discriminatory manner. He has been convicted of serious criminal offenses. He is now serving a penitentiary sentence of 53 years to life.

B. Powers suffered actual injury when his jury was not selected pursuant to racially nondiscriminatory criteria.

Essentially, the State argues that Powers does not have standing because he has failed to show that he has suffered actual injury. Br. for Resp. 10-11. Powers cannot demonstrate injury, the state contends, since he is not of the same race as the excluded black jurors. Br. for Resp. 8-11. In other words, the State argues that a white defendant does not suffer any injury when the prosecution uses its peremptory challenges in a racially discriminatory manner against black jurors. The State's reasoning is seriously flawed.

When the prosecution engages in racial discrimination in jury selection, the defendant, regardless of his race, is denied his fundamental right to a jury that has been selected pursuant to nondiscriminatory criteria. *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). When this occurs, the injury to a white defendant is the same as that to a black defendant. The exclusion of blacks from the jury "contravenes the very idea of a jury." *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 330 (1970). The intentional exclusion of identifiable segments of the community from the jury denies the defendant the benefit of their qualities of human nature and varieties of human

experience. *Peters v. Kiff*, 407 U.S. 493, 503 (1972). Thus, the exclusion of jurors belonging to any identifiable group cannot be squared with the constitutional concept of jury trial. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

Black and white defendants do not stand equal before the law if one may object to the exclusion of black jurors due to race and the other may not. Denying standing to Powers because he is white while conferring standing upon black defendants would result in a deprivation of Powers' equal protection guarantees. The state's argument is therefore " • • • inconsistent with the central message of the Equal Protection Clause." *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803, 821-22 (1990)(Stevens, J., dissenting).

This Court has never held that a defendant belonging to one identifiable group does not have standing, under the Equal Protection Clause, to object to the exclusion of venirepersons who belong to another identifiable group. The holdings in this Court's prior equal protection cases merely reflect the fact that the defendants and the excluded jurors in each case were members of the same group. For example, in *Batson*, both the defendant and the excluded jurors were black. *Batson*, 476 U.S. at 82-83. However, the *Batson* court did not hold that a white defendant could not make out a *prima facie* case based on the exclusion of black jurors. *Holland*, ___ U.S. ___, 110 S. Ct. at 813 (Marshall, J., dissenting). In *Holland*, five justices of this Court expressly stated that a white defendant has standing to object on equal protection grounds to the prosecution's use of peremptory challenges to exclude black jurors. *Holland*, ___ U.S. ___, 110 S. Ct. at 811-29.

The State points out that the record in this case does not reflect the final racial makeup of the jury. Br. for Resp. 3. While that fact may be considered by the trial court in determining whether a defendant has established a *prima facie* case of racial discrimination, *United States v. Clemons*, 843 F. 2d 741, 748 (3rd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 97 (1988), it is not relevant to the question presented here – Powers' standing to raise a *Batson* objection. Powers has been denied his right to equal protection, regardless of the racial makeup of the jury that returned the verdict.

Several courts have held that "the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated • • • ." *United States v. Johnson*, 873 F.2d 1137, 1139 (8th Cir. 1989); *United States v. Clemons*, 843 F.2d at 748; *State v. Collier*, 553 So. 2d 815 (1989); *People v. Jenkins*, 555 N.Y.S. 2d 10, 554 N.E. 2d 47, 75 N.Y. 2d 550 (1990); *Stanley v. State*, 313 Md. 50, 542 A. 2d 1267 (1988). As this Court similarly recognized in *Batson*, 476 U.S. at 95-96:

> For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, *McCray v. New York*, 461 U.S. at 965, 77 L.Ed.2d 1322, 103 S.Ct. 2438 (Marshall, J., dissenting from denial of certiorari), would be inconsistent with the promise of equal protection to all. (Footnote omitted).

Thus, "[T]he command of *Batson* is to eliminate, not merely to minimize, racial discrimination in jury selection." *United States v. David*, 803 F.2d 1567, 1571 (11th Cir. 1986), *on remand*, 662 F.Supp. 244 (N.D.Ga. 1987), *aff'd*, 844 F.2d 767 (11th Cir. 1988).

For Powers, the denial of a jury selected pursuant to nondiscriminatory procedures and a criminal conviction clearly constitute an "injury in fact." *Whitmore v. Arkansas*, 495 U.S. ___, 110 S. Ct. 1717, 1723 (1990); *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986). His injury is both "distinct and palpable," as opposed to merely "abstract." *Whitmore*, 495 U.S. ___, 110 S. Ct. at 1723. The harm which Powers has suffered is actual, not "conjectural" or "hypothetical." *Id.* (citations omitted).

Furthermore, Powers' injury can be easily traced to the challenged action – the prosecution's racially discriminatory use of its peremptory challenges – and will be redressed by a favorable decision from this Court. *Id.* (citations omitted). The State's use of seven of ten peremptory challenges to exclude black veniremen gives Powers a sufficient factual basis on which to object under the provisions of *Batson*. *Id.*; *Warth*, 422 U.S. at 508, 518. Powers' criminal conviction provides him with an additional factual basis which gives him standing to litigate this claim.

II.

TRADITIONALLY, THIS COURT HAS NOT ADDRESSED ISSUES THAT HAVE NOT BEEN RAISED AND RULED UPON IN THE LOWER COURTS AND WHICH HAVE NOT BEEN RAISED IN THIS COURT PRIOR TO THE FILING OF RESPONDENT'S BRIEF.

In section II of its brjef, the State of Ohio asks this Court to extend the rule in *Batson* to apply equally to the

State and to the defendant. "(T)he decision of *Batson* . . . should apply with equal vigor to the discriminatory exercise of peremptory challenges by defense and prosecution alike." Br. for Resp. 11. However, it would be inappropriate for the Court to address this issue since it is not properly before the Court in this case. Under 28 U.S.C. § 1257(a), this Court only has jurisdiction to review the final judgment of the highest court of a State. As indicated below, no Ohio court has rendered a decision on this issue. *See Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974).

This issue has never been raised or addressed in any of the lower courts in this case. Nor was it raised in the State's brief in opposition to Powers' petition for a writ of certiorari in this Court. At trial, the state did not object to Powers' use of his peremptory challenges. Following Powers' conviction, the State never filed a cross-appeal to raise such an objection[1], nor did the State raise this issue in any of its state-court pleadings. Prior to filing its brief in this Court, the State has never contended that the *Batson* rule should apply equally to prosecutors and defendants.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). This rule applies to respondents as well as to petitioners. *See Jenkins v. Anderson*, 447 U.S.

[1] Under Ohio law, the State could have sought leave to appeal on this issue. See *State ex rel. Cleveland v. Calandra*, 62 Ohio St. 2d 121 (1980); Ohio Revised Code Annotated (Page) § 2945.67(A).

231, 234 n. 1 (1980); *Federal Trade Commission v. Grolier*, 462 U.S. 19, 23 n. 6 (1983).

Relying on federal-state comity principles, this Court has held that criminal defendants are precluded from raising issues in federal court where those issues were not properly preserved or raised in the state courts. *Wainwright v. Sykes*, 443 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *Murray v. Carrier*, 477 U.S. 478 (1986). The rationale of those holdings should likewise extend to prosecutors who fail to raise an issue at every stage of the proceedings only to raise it, for the first time, in their brief as respondent in this Court.

CONCLUSION

In order to realize the commands of the Equal Protection Clause – the elimination of racial discrimination in the jury selection process, Petitioner Larry Joe Powers requests that the judgment of the Franklin County, Ohio Court of Appeals be reversed and his case remanded to the trial court for further proceedings consistent with *Batson v. Kentucky*, 476 U.S. at 100. As the State aptly recognizes in its brief, " * * * justice . . . is not served when members of the community are denied their right to participate in the administration of justice because of their race." Br. for Resp. 17.

Respectfully submitted,

RANDALL M. DANA
Ohio Public Defender

ROBERT L. LANE
Chief Appellate Counsel
Counsel of Record

GREGORY L. AYERS
Chief Counsel

JILL E. STONE
Assistant State Public Defender

Ohio Public Defender Commission
Eight East Long St., 11th Floor
Columbus, Ohio 43266-0587
Telephone: 614/466-5394

Counsel for Petitioner

APPENDIX

CONSTITUTION OF THE UNITED STATES

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OHIO REVISED CODE

[BILL OF EXCEPTIONS]

§ 2945.67 [Appeal by state.]

(A) A prosecuting attorney, village solicitor, city director of law, or the attorney general may appeal as a matter or [of] right any decision of a trial court in a criminal case, or any decision of a juvenile court in a delinquency case, which decision grants a motion to dismiss all or any part of an indictment, complaint, or information, a motion to suppress evidence, or a motion for the return of seized property or grants post conviction relief pursuant to sections 2953.21 to 2953.24 of the Revised Code, and may appeal by leave of the court to which the appeal is taken any other decision, except the final verdict, of the trial court in a criminal case or of the juvenile court in a delinquency case.

(B) In any proceeding brought pursuant to division (A) of this section, the court shall, in accordance with Chapter 120. of the Revised Code, appoint the county public defender, joint county public defender, or other counsel to represent any person who is indigent, is not represented by counsel, and does not waive his right to counsel.

TITLE 28 UNITED STATES CODE ANNOTATED

JUDICIARY AND JUDICIAL PROCEDURE

§ 1257. State Courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

AMICUS CURIAE

BRIEF

No. 89-5011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY JOE POWERS,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE TENTH DISTRICT COURT OF APPEALS FRANKLIN COUNTY, OHIO

BRIEF OF THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICUS CURIAE IN SUPPORT OF PETITIONER

HARRY R. REINHART, ESQ.
Counsel Of Record
536 South High Street
Columbus, Ohio 43215
(614) 228-7771

KATHLEEN S. AYNES, ESQ.
P.O. Box 558
Hudson, Ohio 44236
(216) 650-6129

Counsel For Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

[This Page Intentionally Left Blank]

INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers is a statewide organization of more than seven hundred fifty (750) attorneys practicing primarily criminal law. The organization is affiliated with the National Association of Criminal Defense Lawyers and it has been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law. The membership of the Ohio Association of Criminal Defense Lawyers includes both private practitioners and public defenders.

The Association believes that the proper administration of justice can be achieved, and the integrity and accuracy of the fact finding process insured only when racism and prejudice have been removed from the jury selection process. No racial group should be discriminated against through the use of peremptory jury challenges. The right to be free from such discrimination belongs not only to the accused but also to the prospective juror. It is the unique responsibility of the criminal defense lawyer to vindicate and preserve such rights for all members of our society.

With the consent of the parties, as indicated by letters lodged with the Clerk of this Court, the Ohio Association of Criminal Defense Lawyers respectfully submits this brief in support of Petitioner.

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A WHITE DEFENDANT HAVE STANDING TO CHALLENGE THE REMOVAL, BY THE PROSECUTION, OF BLACK PROSPECTIVE JURORS UNDER *BATSON V. KENTUCKY*, 476 U.S. 79 (1986)?

SUMMARY OF THE ARGUMENT

Petitioner Powers, who is white, has standing on his own behalf to challenge the prosecution's removal of black prospective jurors. Petitioner also has third-party standing to raise the objection on behalf of the excluded jurors. Standing should be found as a matter of necessity because the rights of these jurors may not otherwise be protected. It should also be found because the injury to the jurors is derivative to Petitioner's own injury, and because it is in the public interest to prohibit the exclusion of potential jurors for racially discriminatory reasons.

ARGUMENT

Amicus agrees with Petitioner Powers that he has standing in his own right to object to the exclusion of black jurors due to the prosecutor's discriminatory use of peremptory challenges. Because that position is put forth in Petitioner's brief on the merits, it is not further argued here.

There is an additional and separate basis upon which standing may be found: Petitioner Powers has third-party standing to assert the objection for the excluded jurors themselves. Respondent has contended that Petitioner Powers "may not vicariously assert the constitutional rights" of "black citizens to be a part of the judicial process," Respondent's Brief in Opposition, p. 4. This Court, however, has indicated otherwise.

Batson v. Kentucky, 476 U.S. 79 (1986) recognized that "[r]acial discrimination in selection of jurors harms not only the accused," but also "the excluded juror," and the "entire community." Id. at 87.

Justice Kennedy has specifically written that the "exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge is a violation of the juror's constitutional right," and that a defendant may "vindicate his own jurors' right to sit." *Holland v. Illinois*, ____ U.S. ____, 110 S. Ct. 803, 811, 812 (1990) (Kennedy, J., concurring). Similarly, Justices Marshall, Brennan, and Blackmun have agreed that the defendant in *Batson* "was permitted to raise not only his rights, but also those of the members of the venire and of the general public. If Batson could do so, there is no reason a white defendant cannot do so as well." *Holland v. Illinois*, *supra* at 813-814, (Marshall, J., dissenting). Justice Stevens has also acknowledged

that "*Batson* has underpinnings both in the juror's equal protection right to be free of discrimination and in the defendant's right to a fair and impartial factfinder." *Holland v. Illinois*, *supra* at 827, (Stevens, J., dissenting.)

Thus, on at least two recent occasions, a majority of this Court has expressed the view that an accused may assert the injury of an excluded juror in support of his own position. Moreover, the general rules of standing further support Amicus in at least three ways.

I.

First, and perhaps foremost, the rights of excluded black jurors may not otherwise be asserted and protected but through the actions of defendants such as Petitioner Powers. See *Holland v. Illinois*, *supra* at 812, (Kennedy, J., concurring). This same point is argued in a Petition for Writ of Certiorari in yet another case currently pending before this Court:

> [F]rom the perspective of the excluded juror it is critical to extend "standing" to white defendants in cases involving the discriminatory use of peremptory challenges. *Batson* admonishes that its protections are not just for the defendant, but for the excluded jurors and the community as a whole. *Batson*, *supra* at 87. In cases where jurors are excluded on the basis of race from the entire jury pool, the class of jurors has advance knowledge of the exclusion and may institute civil suits on their own behalf seeking a remedy. E.g. *Carter v. Jury Commission*, 396 U.S. 320 (1970). The same is not true in cases such as the one at bar where the exclusion is done through a peremptory challenge; the exclusion comes without warning and without sufficient time to go to court and seek

> a remedy through reinstatement before a completion of the trial. Even if there were time, a litigant may be barred by the abstention doctrine. *Younger v. Harris,* 401 U.S. 37 (1971). Hence, the prohibition of unlawful conduct can be enforced, if at all, only by allowing all defendants to raise the issue.

Dimple Podborny v. State of Ohio, Petition for Writ of Certiorari at p. 13, petition for cert. filed, (No. 87-7065).

This court has found third party standing in cases presenting racial discrimination in forms well designed to avoid judicial review absent such procedure. For example, in *Shelley v. Kraemer,* 334 U.S. 1 (1948), this Court struck down racially restrictive covenants as violative of the Fourteenth Amendment. Subsequently, a co-covenantor sued for damages at law against another covenantor who had sold to a black. *Barrows v. Jackson,* 346 U.S. 249, reh'g. denied 346 U.S. 841 (1953). The defendant, a white seller to a black purchaser, defended by raising a black purchaser's equal protection right. The Court permitted the defendant *jus tertii* or third party standing to raise the black person's right as a defense even though no black was a party to the lawsuit because "it would be difficult if not impossible for the person whose rights are asserted to present their grievance before any Court." Id. at 257. The Court held that:

> Under the peculiar circumstances of this case, we believe reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.

Id. (Minton, J.). See also *Truax v. Raich,* 239 U.S. 33, 38 (1915) (employee allowed to assert to right of the employer); and *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (discussed *infra*).

Indeed, this Court has indicated that "[w]here practical obstacles prevent a party from asserting rights on behalf of itself" and where the litigant, "can reasonably be expected properly to frame the issues and present them with the necessary adversary zeal," the third party standing rule is frequently relaxed. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 956 (1984). The obstacles hindering the litigation of this matter by the excluded jurors have been noted above, and the necessary adversary zeal[1] of Petitioner Powers and Respondent State of Ohio can hardly be questioned. Compare *Eisenstadt v. Baird,* 405 U.S. 438, 446 (1972) where a distributor of contraceptives was allowed standing to challenge the constitutionality of a state law banning the distribution of such devices to unmarried persons. Unmarried persons were not themselves subject to prosecution and to that extent were denied a forum in which to assert their own rights. See also, *Griswold v. Connecticut,* 381 U.S. 479 (1965) where a physician was allowed to raise the constitutional rights of married couples with whom he had a professional relationship. The Court reasoned that "[t]he rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a

---

[1]This case is distinguishable from cases such as *Tileston v. Ullman,* 318 U.S. 44 (1943) on this point. In *Tileston* petitioner sought standing as a plaintiff in a declaratory judgment action to assert the rights of others. This Court refused to find standing where to do so would "blur" the "case or controversy" requirement set forth in Article III of the Constitution. In the case at bar there is no question that a valid "case or controversy" exists within the meaning of Article III.

suit involving those who have this kind of confidential relation to them." 381 U.S. at 481. See also, *Myer v. Nebraska,* 262 U.S. 390 (1923); *Alder v. Board of Education,* 342 U.S. 485 (1952); *NAACP v. Alabama,* 357 U.S. 449, 458-460 (1958); *NAACP v. Button,* 371 U.S. 415, 428 (1963).

II.

Second, there exists a "special relationship" or "substantial relation" between the accused and a potential juror wherein the third party's enjoyment of the right to sit as a juror, absent discriminatory exclusion, coincides with the defendant's freedom from derivative injury—the injury of facing a jury not fairly and impartially chosen. See *Holland v. Illinois, supra* at 812, Kennedy, J., concurring and L. Tribe, *American Constitutional Law,* 138-139 (2d ed. 1988). See also, *Pierce v. Society of Sisters, supra* where this Court permitted a private school to assert the substantive due process rights of the parents and children of that school as third parties. 268 U.S. at 534-536. Just as access to a private school is a public good that can be protected only collectively or derivatively, so too is access to a petit jury, while subject to the attack of racially discriminatory peremptory challenges, a public good that can be protected only by a party to the litigation such as Petitioner Powers. See also *Singleton v. Wulff,* 428 U. S. 106, 114-115 (1976). Indeed, there is a compelling argument that ". . . whenever a denial of third-party standing to a derivatively injured litigant. . . can be shown likely to impair the third party's enjoyment of an allegedly protected right, standing should be granted and the allegations decided on the merits." L. Tribe, *American Constitutional Law* at 139-140 (2d ed. 1988).

III.

Third, Petitioner Powers must function in this case as a private attorney general in order to protect the interests of others who either lack resources or who are themselves insufficiently motivated to seek vindication of these rights. See, e.g., *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470 reh'g. denied, 309 U.S. 642 (1940) (broadcaster on behalf of listening public); *Gladstone Realtors v. Bellwood,* 441 U.S. 91 (1979) (a village on behalf of its citizens).

Discriminatory use of peremptory challenges offends the Fourteenth Amendment. This Court has on many occasions spoken of the importance of obliterating racism from the process of jury selection. Justice Powell, the author of the *Batson* opinion, later wrote of the case that "[o]ur decision in *Batson,* however, was justified by the compelling need to remove all vestiges of invidious racial discrimination in the selection of jurors. . . ." *Gray v. Mississippi,* 481 U.S. 648, 642 (1987) (Powell, J., concurring.) And in *Batson* itself, the Court wrote:

> In *Strauder,* the Court explained that the central concern of the recently ratified Fourteenth Amendment was to put an end to governmental discrimination on account of race. . . Exclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.

Batson v. Kentucky, 476 U.S. 79, 85 (1986).

Batson made it clear that "the Constitution prohibits all forms of purposeful racial discrimination in the selection of jurors," *Batson, supra* at 88, and that "[t]he standard we adopt under the Federal Constitution is designed to ensure that a State does not use peremptory challenges

to strike *any black juror* because of his race." *Batson, supra* at 99, n. 22 (emphasis added). See also *Strauder v. West Virginia,* 100 U.S. 303 (1880); *Taylor v. Louisiana,* 419 U.S. 522 (1975); and *Peters v. Kiff,* 407 U.S. 493 (1972). These cases leave little doubt that the continuing difficult struggle to eradicate racism from the jury selection process is of primary importance to this Court and the nation.

But eradication of racism is not the only public interest at stake. Full participation in the criminal justice system by all groups of our society is necessary to insure public confidence in that system. This is an equally compelling interest. See, e.g., *Lockhart v. McCree,* 476 U.S. 162, 174-175 (1986); *Batson v. Kentucky, supra* at 86-88; *Holland v. Illinois, supra* at 815-817 (Marshall, J. dissenting.)

Normally, society looks to an agency of the State to protect the public interest and private attorney generals merely to supplement the effort. But here it is the action of the State's own representative that has caused the harm. Therefore, if the public interest is to be vindicated at all, it will be only through efforts of the accused and counsel.

This is not a case where no one is injured or where the injury is innocuous, vague or amorphous. This is not a case where no one has standing. Mr. Powers has been personally injured by the exclusion of blacks from his jury. It is also a case where the excluded black jurors have been injured by the denial of their right to participate in the criminal justice system due to the color of their skin. These injuries are not hypothetical. Mr. Powers was able to see the people in the courtroom whose rights were infringed. These individuals were probably unaware of the what took

place. They were peremptorily challenged by the prosecuting attorney and excused by the trial judge with no indication that their removal from the jury was the result of invidious racial discrimination. If this process goes unchallenged, it is not beyond the realm of possibility that state legislatures could expand the number of peremptory challenges so that, in the future, blacks could always be removed from petit juries. The result would be a system, apparently sanctioned by the constitution, where in some communities a white defendant would never be judged by a jury including a black person and where blacks could be uniformly discriminated against and denied a forum within which to challenge the discrimination. This would be a result that over a hundred years of civil rights legislation and litigation would not anticipate. It is a specter that our Constitution may not tolerate. Thus, even if Petitioner Powers' claim of direct standing to assert his Fourteenth Amendment right fails, third-party standing on behalf of the excluded black jurors must be found.

CONCLUSION

Petitioner Powers has standing both in his own right and on behalf of the jurors against whom the state has invidiously discriminated. Petitioner complained of the actions taken by the State's representative at trial. He asserted not only his right but their rights as well. The perempted jurors can no more be expected to assert these rights on their own behalf than could the black purchaser in *Barrows v. Jackson, supra.* In many respects, the discrimination in *Barrows* was more open and the state action far less immediate and troublesome than is here the case. Larry Joe Powers has standing to raise this issue as a matter of public policy and constitutional necessity. In this situation, the interests of the accused and society are one.

Respectfully Submitted,

/s/

Harry R. Reinhart
Counsel of Record
536 South High Street
Columbus, Ohio 43215
(614) 228-7771

and

/s/

Kathleen S. Aynes, Esq.
P.O. Box 558
Hudson, Ohio 44236
(216) 650-6129
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of this Court, I, Harry R. Reinhart, a member of the bar of this Court, hereby certify that on this 19th day of April, 1990, three copies of the foregoing Brief for the Ohio Association of Criminal Defense Lawyers as *Amicus Curiae* In Support of Petitioner were mailed, first class postage paid, to Robert Lane, Esq., Eight East Long Street, 11th Floor, Columbus, Ohio 43266-0587, Counsel for Petitioner; Alan C. Travis, Esq., Hall of Justice, 369 South High Street, Columbus, Ohio 43215, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Larry Joe Powers' address is Institution Number 196-573, Southern Ohio Correctional Facility, P.O. Box 45699, Lucasville, Ohio 45699-0001.

/s/

Harry R. Reinhart
Counsel for Amicus Curiae

[This Page Intentionally Left Blank]

[This Page Intentionally Left Blank]

[This Page Intentionally Left Blank]

AMICUS CURIAE

BRIEF

No. 89-5011 (9)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

LARRY JOE POWERS,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

ON WRIT OF *CERTIORARI* TO THE TENTH DISTRICT COURT OF APPEALS, FRANKLIN COUNTY, OHIO

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF OHIO, AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF PETITIONER

Barbara D. Underwood
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6188

Steven R. Shapiro
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Julius LeVonne Chambers
Charles Stephen Ralston
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Other Authorities

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws of this country. The ACLU of Ohio is one of its state affiliates. As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of justice. Of particular relevance here, the ACLU represented petitioner in *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated and remanded*, 478 U.S. 1001 (1986), the first federal case holding that a prosecutor's use of peremptory challenges to screen prospective jurors on the basis of race violates the Constitution.

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years, its attorneys have represented parties and have participated as *amicus curiae* in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a longstanding concern with the issue of exclusion of blacks from service on juries. Thus, it has raised jury discrimination claims in appeals from criminal convictions, pioneered in the affirmative use of

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

civil actions to end discriminatory practices,[2] and represented the petitioner in *Swain v. Alabama*, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude blacks from jury venires.

More recently, both the ACLU and the Fund participated as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Holland v. Illinois*, 110 S.Ct. 803 (1990), two cases that raised issues similar to the issues presented here.

STATEMENT OF THE CASE

The petitioner in this case was convicted of murder by an all white jury after "the state utilized seven of ten peremptory challenges to excuse prospective jurors who were black." (J.A.24).[3] Petitioner objected to those exclusions at trial and on appeal. *Id.* Both courts concluded, however, that petitioner lacked standing to raise a *Batson* claim on the facts of this case because he is white. (J.A.8, 31). As expressed by Ohio's intermediate appellate court: "We find no reason to extend *Batson* to include an automatic contention of denial of equal protection or some other constitutional claim by a white defendant because of the use of peremptory challenges by a prosecutor to exclude black members from the jury." (J.A.31). Petitioner's appeal to the Ohio Supreme Court was then dismissed *sua sponte* "for the reason that no substantial constitutional question exists . . . ." (J.A.42). Apparently disagreeing with that assessment, this Court granted *certiorari*.

---

[2] *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Turner v. Fouche*, 396 U.S. 346 (1970), *Mitchell v. Johnson*, 250 F.Supp. 117 (M.D.Ala. 1966).

[3] The record does not indicate whether any blacks were ultimately chosen for the petit jury. (J.A.24).

SUMMARY OF ARGUMENT

It is now clear beyond any doubt that the Equal Protection Clause of the Fourteenth Amendment prohibits a prosecutor from using peremptory challenges to exclude potential jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79. Moreover, a criminal defendant may clearly enforce that ban on discriminatory jury selection when the defendant is of the same race as the excluded jurors. *Id.* The Ohio courts held in this case that a white criminal defendant had no right to enforce the ban on the state's use of peremptory challenges to exclude black potential jurors. That limitation, based on the race of the defendant, is inconsistent with this Court's precedents, undermines the effectiveness of the ban on jury discrimination, and should be rejected.

Indeed, *amici* believe it *was* rejected only a few months ago when five Justices of this Court clearly stated that a defendant's race does not affect his standing to raise a *Batson* claim under the Equal Protection Clause. *Holland v. Illinois*, 109 S.Ct. at 811-812 (concurring opinion of Justice Kennedy); *id.* at 812-14 (dissenting opinion of Justices Marshall, Brennan, and Blackmun); *id.* at 821-22 (dissenting opinion of Justice Stevens).

These statements in *Holland* reflect well settled law. First, a criminal defendant of any race is entitled to assert the rights of the excluded jurors under this Court's precedents concerning standing to raise questions of jury discrimination, and under settled general principles of third party standing. Those principles do not require, or even suggest, that such standing should be limited on the basis of the race of the defendant. Second, a criminal defendant is entitled to assert his own equal protection right to be free of race discrimination in the selection of the jury that hears his case. That right extends to all

defendants and not merely to those of the same race as the excluded jurors.

The evil of race-based jury selection is so great, and so persistent, that its elimination cannot be reconciled with a cramped view of the class of persons entitled to raise the claim. Our national commitment to eradicate racial discrimination from American society, and the commitment of our courts to eliminate race discrimination from the judicial system, require that we extend to everyone affected by race discrimination in jury selection the right to challenge it.

ARGUMENT

I. A CRIMINAL DEFENDANT HAS STANDING, WITHOUT REGARD TO RACE, TO ASSERT THE RIGHTS OF POTENTIAL JURORS TO BE FREE OF RACE DISCRIMINATION IN THE SELECTION OF THE JURY THAT TRIES HIS CASE

When the state selects jurors on the basis of race, it denies the excluded jurors the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. As early as 1880 this Court recognized that race-based jury selection harms the excluded jurors by casting upon them "a brand" and "an assertion of their inferiority." *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879). In that case, the Court noted the harm to the excluded jurors in the course of holding that the practice violated the rights of the criminal defendant. In 1970, however, this Court expressly held that the rights of the jurors themselves are violated by race-based jury selection. *Carter v. Jury Commission*, 396 U.S. 320, 329-30 (1970). Finally, in 1972, the Court recognized the standing of a white defendant to challenge the race-based exclusion of blacks from the grand jury that

indicted him and the petit jury that convicted him. *Peters v. Kiff*, 407 U.S. 493 (1972).

While *Peters* rests partly on the rights of the individual defendant, it also stands for the proposition that a white criminal defendant has standing to raise the rights of excluded black jurors. Three members of the Court, stating that the defendant was denied his own due process right to be tried by a jury selected by nondiscriminatory means, noted that the rights of the excluded jurors had been violated as well. 407 U.S. at 499-500 (opinion of Marshall, J.). Three other members of the Court joined in the holding on the ground that it was necessary to give the white defendant standing in order to "implement the strong statutory policy of [18 U.S.C.] §243 [making race discrimination in jury selection a crime], which reflects the central concern of the Fourteenth Amendment with racial discrimination . . . ." 407 U.S. at 507 (opinion of White, J.). In effect, then, both opinions are grounded in the view that a broad standing rule is necessary in order to implement the strong constitutional and statutory policy against race discrimination in jury selection, a policy which protects excluded jurors as well as criminal defendants.

In sum, *Strauder* held that a black defendant could challenge the exclusion of black potential jurors, recognizing that the rights of the jurors were implicated. *Carter* held that the jurors could challenge their own exclusion. And *Peters* held that a white defendant could challenge the exclusion of black potential jurors.

The logic of those standing decisions applies with equal force to any claim of race-based jury selection, whether the race-based selection occurs at the peremptory challenge stage, or at any other stage of the jury selection process. In *Batson* this Court recognized that the Equal Protection Clause is as much violated by race-based peremptory challenges as by any other race-based jury selection practices. And *Batson* reaffirmed in the

context of peremptory challenges the observation of the *Strauder* Court that race-based jury selection violates the rights of the excluded jurors, 476 U.S. at 87. It follows under *Carter* that standing to object to race-based peremptory challenges extends to excluded jurors, and under *Peters* that such standing extends to any criminal defendant without regard to race. Just as *Strauder* compelled the holdings of *Carter* and *Peters*, so too *Batson* compels the holding that race-based peremptory challenges violate the equal protection rights of the excluded jurors, and that all criminal defendants, regardless of race, have standing to assert those rights.

In the case at bar, the Ohio courts misread this Court's precedents to reach the contrary conclusion. First, the Ohio Court read *Batson* as denying standing to a criminal defendant whose race was different from that of the excluded jurors. (J.A.31). But of course *Batson* did no such thing; it simply limited its holding to the facts of the case presented, reserving for another day the question of standing for other parties. Second, the Ohio Court read *Peters v. Kiff* as extending standing to defendants without regard to race only to challenge discrimination in the selection of grand jurors rather than petit jurors, noting that the concurring opinion of Justice White omitted any discussion of petit jurors. (J.A.25-27). But the logic of Justice White's opinion admits of no such limiting principle. Surely the strong constitutional and statutory policy against race discrimination in jury selection is not more concerned with grand jurors than with petit jurors. The most likely explanation for Justice White's omission of any discussion of the petit jury is that the defendant likewise failed to mention the petit jury in his list of questions presented in the petition for *certiorari*, *see* 407 U.S. at 495-96, and not that the concurring justices would have denied the white defendant standing to challenge the exclusion of blacks from the petit jury. Finally, the Ohio Court attempted to distinguish *Peters* on the ground that it involved the exclusion

of blacks by statute rather than by peremptory challenge. (J.A.27). But, after *Batson*, that is a distinction without a difference as far as the Equal Protection Clause is concerned.[4]

Furthermore, the conclusion that a white criminal defendant has standing to challenge the use of peremptory challenges to exclude blacks from his jury is compelled not only by this Court's precedents in the area of jury discrimination, but also by general principles of third party standing.

In a long line of cases, this Court has recognized a litigant's standing to assert the rights of third parties when the following conditions are satisfied: a) serious obstacles to the assertion of the right by the third parties themselves, b)injury-in-fact to the litigant, and c) a close nexus between the litigant and the third parties whose constitutional rights are at stake. Thus, private schools have standing to assert the rights of parents and students to choose private school education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). Likewise, physicians have standing to assert the rights of their patients to contraceptives, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *cf. Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972)(nonphysician distributor of contraceptives); and to abortion, *Singleton v. Wulff*, 428 U.S. 106, 111-18 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973). Beer sellers have standing to invoke their young male customers' equal protection rights to buy beer at the same age as women, *Craig v. Boren*, 429 U.S. 190, 192-97 (1976). Attorneys have standing to invoke their clients' rights to

---

[4] The Ohio Court correctly noted that *Taylor v. Louisiana*, 419 U.S. 522 (1975), relied on the Sixth Amendment and not the Equal Protection Clause to uphold a defendant's right to challenge the exclusion from his jury of a class to which he did not belong. But while *Taylor* does not compel the recognition of cross-class standing here, the case is certainly not adverse to defendant's claim.

adequate legal representation, *Dep't of Labor v. Triplett*, 110 S.Ct. 1428 (1990). White property sellers have standing to invoke the equal protection rights of black prospective buyers to avoid the enforcement of a racially restrictive covenant, *Barrows v. Jackson*, 346 U.S. 249, 255-58 (1953).

In all of these cases the primary victims were ill situated to litigate on their own behalf, whether for reasons of privacy, a small individual stake in the outcome, or for other reasons. The litigants, by contrast, had a large stake in the outcome and were seriously harmed by the action at issue, whether or not their own constitutional rights were also violated. The nexus between the litigants and the victims whose constitutional rights were violated was sufficient to assure the court of vigorous advocacy of the victims' rights. Here, too, the excluded jurors are extremely ill situated to challenge their exclusion, the criminal defendant is seriously injured in fact, and the nexus between the interests of the defendant and the jurors is strong enough to assure vigorous advocacy of the jurors' rights.

In particular, the jurors improperly excluded on the basis of race are ill suited to assert their own rights for several reasons. First, potential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their selection or exclusion. Second, the excluded jurors cannot easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges rather than through the systematic practices of the jury clerk and commissioners at issue in *Carter*, *see* 396 U.S. at 324-28, because it is difficult to make the necessary showing that the discrimination is likely to recur. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983); *Rizzo v. Goode*, 423 U.S. 362, 371-72 (1976). And third, the practical barriers to suit by an excluded juror are at least as great as the legal barriers because of the small stake of any individual juror, and the economic and other burdens of litigation.[5]

Moreover, a criminal defendant of any race is unquestionably injured by race discrimination in the selection of the jury that tries him, and his interest in avoiding that injury is strong enough to assure the court that he will vigorously represent the interests of the excluded jurors. First, every defendant has an interest in diversity on his jury, with its prospect for increasing the chance that at least one juror will construe the evidence his way, and the chance that the jury will fail to reach a unanimous verdict. Second, every defendant has an interest in defeating the prosecutor's efforts to select a favorable jury. Thus, in any case where the prosecutor chooses to exclude members of one race from the jury, it follows that the defendant has an interest in including them. Sometimes it will be apparent why the prosecutor wants to exclude members of a particular race. For example, he might want to exclude members of the same race as the defendant, or the defendant's lawyer, *e.g.*, *State v. Superior Court*, 760 P.2d 541 (Ariz. 1988), or the defendant's co-defendants or co-perpetrators, *e.g.*, *United States v. Townsley*, 856 F.2d 1189 (8th Cir. 1988)(narrowly divided *en banc* court denying standing). In those cases, the prosecutor seems to rely on the assumption, questionable but widespread, that jurors will favor members of their own race. In other cases, like this one, the motivations may be less apparent from the record. Perhaps the prosecutor makes the assumption that minority

---

[5] "Individual jurors subjected to peremptory racial exclusion have the legal right to bring suit on their own behalf, but as a practical matter this sort of challenge is most unlikely. The reality is that a juror dismissed because of his race will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to set in motion the arduous process needed to vindicate his own rights." *Holland*, 110 S.Ct. at 812 (Kennedy, J., concurring)(citation omitted).

jurors are generally hostile to law enforcement, or to the victims, or to prosecutions for a particular kind of crime, or to prosecutions where -- as here -- capital punishment is a possibility. Whether those assumptions are well founded or not, and whether the defendant shares them or not, the prosecutor's preferences give the defendant a strong incentive to try to defeat them.

The defendant's interest in creating diversity on the jury, and in defeating the prosecutor's strategy for jury selection, are each important enough to assure that he will vigorously represent the rights of the excluded jurors in order to protect those interests. A further guarantee of vigorous advocacy is the obvious fact that every defendant has an overwhelming interest in identifying and preserving reversible error at trial, and asserting reversible error on appeal. When, as here, a white defendant sees a chance to overturn his conviction by challenging the race-based exclusion of black jurors, his interest in the success of that claim guarantees the vigorous advocacy required by principles of third party standing.

Thus, a straightforward application of general principles of third party standing leads to the conclusion that any criminal defendant, without regard to race, has standing to raise the rights of potential jurors to be free of race discrimination in jury selection.

II. A CRIMINAL DEFENDANT OF ANY RACE HAS A CONSTITUTIONAL RIGHT, UNDER THE EQUAL PROTECTION CLAUSE, TO FREEDOM FROM RACE DISCRIMINATION IN THE JURY SELECTION PROCESS

This Court has long recognized that race discrimination in jury selection violates the rights of the criminal defendant who is tried by a jury selected through discriminatory means. In *Strauder v. West Virginia*, 100 U.S. 303, the Court held that a black defendant was denied

equal protection of the laws when blacks were excluded from the jury that tried him. In *Peters v. Kiff*, the Court expressly reserved the equal protection question, 407 U.S. at 497 n.5, while holding that a white defendant was denied his personal right to due process of law when he was indicted and tried by juries "selected in an arbitrary and discriminatory manner . . . ." *Id.* at 502 (opinion of Marshall, J.); *accord*, *id.* at 507 (opinion of White, J.). And in *Taylor v. Louisiana*, 419 U.S. at 530, this Court held that race and sex discrimination in the selection of the venire violates the defendant's Sixth Amendment right to a jury drawn from a representative cross-section of the community. After this Court's ruling in *Holland*, of course, the Sixth Amendment does not protect the defendant from race discrimination in the use of peremptory challenges. Nevertheless, the Due Process and Equal Protection Clauses continue to protect the defendant from race discrimination at every stage in the selection of the jury that hears his case.

The defendant's right to be free of race discrimination in jury selection is not, as some have supposed, simply a right to the opportunity to have his "racial peers" on the jury. *See, e.g., Fludd v. Dykes*, 863 F.2d 822, 825 & n.5 (11th Cir. 1989). Rather, it is a right to be free from racial discrimination in the jury selection process.[6] *Strauder*, like *Batson*, addressed the right of a defendant to be free of discrimination against jurors of his own race because those were the facts presented to the Court, and perhaps because the *Strauder* Court did not foresee the possibility that a white defendant would object to the exclusion of black jurors. None of this Court's decisions, however, even remotely endorses the principle that white defendants suffer no cognizable

---

[6] "[W]hatever his race, a criminal defendant has standing to challenge the system used to select his grand or petit jury, on the ground that it arbitrarily excludes from service the members of any race . . . ." *Peters v. Kiff*, 407 U.S. at 504.

injury when blacks are excluded from jury service on racial grounds. To the contrary, that proposition, which lies at the heart of the decision below, is factually and constitutionally unsupportable for reasons stated as early as *Strauder*, and as recently as *Batson* and *Holland*.

The view that the exclusion of black jurors violates only the rights of black defendants and not the rights of white defendants rests on the factual presumption that jurors routinely ignore their oath and favor defendants of their own race. That factual presumption is unsupportable, and has been repeatedly rejected by this and other courts. Moreover, even if some loose statistical support could be found for that race-based generalization, settled principles of equal protection would prohibit any governmental body from relying on it. Just as the Constitution prohibits prosecutors from relying on any such race-based generalization, *see Batson v. Kentucky*, so too does the Constitution prohibit this Court from relying on race-based generalizations. Finally, even if the factual and legal bars to reliance on the presumption were not insurmountable, there would be insuperable practical barriers. For the presumption of race-based bias on the part of jurors supports a much broader standing rule than the one in fact adopted by the court below. In short, the decision is flawed for factual, legal and practical reasons, any one of which would be sufficient to justify reversal.

A. The Decision Below Rests On An Unsupportable Factual Premise That This And Other Courts Have Previously Rejected

The view that the exclusion of black jurors violates only the rights of black defendants and not the rights of white defendants rests on the factual presumption that jurors routinely ignore their oath and favor defendants of their own race. That presumption, not surprisingly, is neither articulated in the opinion nor supported by any evidence in the record. It is also belied by the everyday

experience of numerous other courts. As Judge Kearse has observed: "[I]t is fallacious to assume that all persons sharing an attribute of skin color, or of gender or ethnic origin, etc., will *ipso facto* be partial to others sharing that attribute." *McCray v. Abrams*, 750 F.2d at 1121. Three other Second Circuit judges made the same point in more personal terms in *United States v. Newman*, 549 F.2d 240, 250 n.8 (2d Cir. 1977):

> Blacks are the major victims of wrongdoers and it is unlikely that they hesitate to convict where the case warrants it. All of the members of this court, hearing the present case, have served more than a decade as judges of the United States District Court for the District of Connecticut. It has been our experience that Black persons, summoned and drawn for jury panels in that court, have been excellent jurors and have shown no predilection to favor or harm any group, class or kind of persons but have judged the facts on the evidence presented in court in the light of the court's charge.

Social science evidence, too, shows that jurors of a particular race do not speak with a single voice. While some members of minority groups may be sympathetic to members of their own group, others "respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority." *Castaneda v. Partida*, 430 U.S. 482, 503 (1977)(Marshall, J., concurring)(citing sources at nn.2-3).

Moreover, this Court has already declined to adopt any presumption about the likely views of jurors of a particular race. As Justice Marshall put it in *Peters v. Kiff*:

> [W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

407 U.S. at 503-04.[7] In short, "a person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87, *quoting Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227 (1946)(Frankfurter, J., dissenting).

B. The Equal Protection Clause Itself Prohibits This Court From Relying On Any Race-Based Presumption About The Likely Views Of Jurors

Even if there were some loose statistical validity to the presumption that jurors favor members of their own race, it would be profoundly wrong to enshrine in our constitutional jurisprudence any such presumption. The Constitution prohibits state legislatures, public employers, public universities, and a host of other institutions

[7] *See also Ballard v. United States*, 329 U.S. 187, 193-94 (1946) (exclusion of women from federal juries "may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded").

from acting on generalizations based on race, sex, or certain other suspect classifications, even when there is some statistical support for those classifications. *See, e.g., Craig v. Boren*, 429 U.S. at 208 n.22, 209 (different drinking ages for men and women unconstitutional despite statistics tending to show some disparity between sexes in incidence of driving while intoxicated).

Classifications based on race, in particular, have been so pernicious, so susceptible to misinterpretation and misuse, so ill founded, and so antithetical to the American conception of fairness and individual dignity, that this Court has regularly held that the Constitution prohibits their use. Most recently, in *Batson*, this Court prohibited prosecutors from relying on any such presumption in exercising peremptory challenges. A rule limiting standing to defendants of the same race as the excluded jurors would be based on the same illicit presumption that this Court rightly rejected in *Batson*. It cannot be the law that the same race-based presumption that is constitutionally forbidden to prosecutors is the foundation of this Court's jury discrimination jurisprudence.

Moreover, the ban on jury discrimination announced in *Batson* does not in fact rest on any presumption about the likely views of minority jurors. Whether the defendant is deprived of jurors of his own race, as in *Strauder*, or jurors of a different race, as in *Peters*, his trial is tainted by race discrimination in a manner prohibited by the Equal Protection Clause, as well as the Due Process Clause, of the Fourteenth Amendment.

That taint, as this Court recognized in *Strauder*, *Peters*, and *Batson*, harms not only the excluded jurors, but also "the accused whose life or liberty they are summoned to try," *Batson*, 476 U.S. at 87, and finally the entire community, because "[s]election procedures that purposefully exclude black persons from juries under-

mine public confidence in the fairness of our system of justice." *Id.*

Whether or not the community has a right to a verdict that commands community confidence, surely the defendant himself has that right. To deprive only defendants in petitioner's situation of a remedy when the prosecutor intentionally selects the jury in a way that undermines community confidence in the verdict is to deny such defendants both the equal protection of the laws, and due process.

It is no more incongruous to recognize a defendant's equal protection right to the possibility of jurors of a different race than to recognize a person's equal protection right to marry a person of a different race, *Loving v. Virginia*, 388 U.S. 1 (1967), or to go to school with children of a different race, *Brown v. Board of Education*, 347 U.S. 483 (1954).[8] In each case, the state prevents an association between persons of different races, and that action amounts to unconstitutional race discrimination, violating the equal protection rights of both parties to the obstructed association.

The right to that association does not rest on any presumption that members of another race have particular qualities or views that make them especially desirable as spouses, classmates, or jurors. Instead, it rests on the simple proposition that the state may not act on the basis of race to prevent the association.

[8] *Cf. Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)(white tenant of apartment complex is injured by discrimination against nonwhite applicants for apartment, and therefore may enforce statutory ban on race discrimination in housing).

C. Race-Based Presumptions About The Views Of Jurors Do Not Justify The Standing Rule Announced Below

Even if this Court were to try to fashion a standing rule based on the dubious presumption at issue, that presumption would fail to justify the limitation of standing to defendants of the same race as the excluded jurors. For the presumption that jurors will favor members of their own race may lead jurors to favor not only defendants of their own race, but also defense attorneys or defense witnesses of that race, or defendants in some other way associated with the race of the jurors. Thus, a rule of standing grounded in the presumption should give standing to any defendant who could show some association or community of interest with persons of the race of the excluded jurors sufficient to risk bringing the presumed bias into play.[9] Surely to state that rule is to demonstrate its absurdity. For, as argued above at pp.9-10, any time the prosecutor concludes that he would benefit from excluding jurors of a particular race, it follows that the defendant has some community of interest with the members of the excluded race, sufficient to support a claim of standing.

Indeed, in a case like this one, where the record does not reveal any specific association between the white defendants and members of the excluded race, the most likely explanation for any efforts by the prosecutor to exclude black jurors rests not on a presumption that minority jurors favor members of their own race, but on a different presumption: that minority jurors are likely

[9] That community of interest might be established, for example, by the race of the defendant's lawyer or co-perpetrator, or his publicly stated views, *see* pp.9-10, *supra* and cases cited; *see also* Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," 56 U.Chi.L.Rev. 153, 191-92 (1989), *cited in Holland*, 110 S.Ct. at 822 n.6 (Stevens, J., dissenting).

to be unsympathetic to the government, particularly in a capital case. That presumption, like any other presumption based on race, simply has no place in a criminal trial. The constitutional prohibition on race discrimination requires the state to ferret out hostility to law enforcement, or to the death penalty, by methods other than reliance on racial stereotypes. But if, for the sake of argument, we assume there may be some loose statistical validity to the forbidden presumption, then another reason appears for recognizing that all criminal defendants must have standing to challenge it. For if white defendants are denied standing to challenge that race-based exclusion, then the result will be that black defendants, but not white defendants, are entitled to object to the race-based exclusion from their juries of people widely thought sympathetic to capital defendants of any race. To give black defendants, but not white defendants, the right to prevent such an exclusion, would be to deny white defendants the equal protection of the laws.

CONCLUSION

Five members of this Court have already acknowledged, in *Holland v. Illinois*, that a white criminal defendant has standing to raise an equal protection challenge to the exclusion of blacks from his jury. That conclusion is compelled by logic, by precedent, and by the constitutional and statutory commitment to eliminate the last vestiges of race discrimination from the trial of a criminal case.

For the reasons stated in *Holland*, as well as those stated above, this Court should reverse the decision below, and hold that a criminal defendant of any race has standing to challenge the use of peremptory challenges to exclude potential jurors on the basis of race.

Respectfully submitted,

Barbara D. Underwood
(*Counsel of Record*)
40 Washington Square South
New York, New York 10012
(212) 998-6188

Steven R. Shapiro
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Julius LeVonne Chambers
Charles Stephen Ralston
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

Dated: April 20, 1990

AMICUS CURIAE

BRIEF

No. 89-5011

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LARRY JOE POWERS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Tenth District Court of Appeals, Franklin County, Ohio

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING REVERSAL

KENT S. SCHEIDEGGER*
CHARLES L. HOBSON
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, California 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae Criminal Justice Legal Foundation

*Counsel of Record

QUESTION PRESENTED

Does a white defendant have standing to challenge the exclusion of black venire members via peremptory challenge under *Batson* v. *Kentucky*, 476 U. S. 79 (1986)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statute

State Constitution

Miscellaneous

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LARRY JOE POWERS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Tenth District Court of Appeals, Franklin County, Ohio

---

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING REVERSAL

INTEREST OF AMICUS

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation. CJLF seeks to further the interests of victims of crime in the criminal justice system. Specifically, CJLF seeks a recognition that victims as well as defendants are entitled to fundamental fairness and equal protection of the law.

---

1. CJLF has received written consent of the parties to file this brief.

Defendant in the present case asserts that standing to object to racially motivated peremptory challenges under *Batson* v. *Kentucky*, 476 U. S. 79 (1986) is not limited to defendants of the same race as the excluded jurors. CJLF agrees, but further believes that such standing is not limited to the defense, a question left open in *Batson*, 476 U. S., at 89, n. 12.

A decision in favor of defendant in this case may or may not extend *Batson* protection to the victims of crime, depending on which of the available paths the Court chooses to take. Because this choice may have a substantial impact on the victims whose interests CJLF was formed to represent, CJLF has a substantial interest in this case.

SUMMARY OF ARGUMENT

Peters v. *Kiff*, 407 U. S. 493 (1972) is a controlling precedent. While there are differences between *Peters* and the present case, all of the differences which are relevant to the standing question favor standing in this case.

Under the "narrowest grounds" rule of *Marks* v. *United States*, 430 U. S. 188, 193 (1977), the holding of the fragmented Court in *Peters* is the position taken by Justices White, Brennan, and Powell. Therefore, 18 U. S. C. § 243 is the basis of standing.

Section 243 embraces the entire jury selection process and every actor in it. A peremptory challenge based on race is a violation of the statute. Any party to the action has standing to object to any violation of the statute.

ARGUMENT

I. Defendant's standing is compelled by *Peters* v. *Kiff*.

The Ohio Court of Appeals held in this case that defendant could not object to the peremptory challenge of jurors on the basis of race under *Batson* v. *Kentucky*, 476 U. S. 79 (1986)

because defendant is not of the same race as the jurors. J. A. 31. However, in *Peters* v. *Kiff*, 407 U. S. 493 (1972), a white defendant was permitted to challenge the exclusion of blacks from jury service. If *Peters* is not to be overruled and if there is no meaningful basis on which to distinguish it, then *Peters* requires that defendant be permitted to object on this basis.

Peters did not produce a majority opinion. That does not preclude it from being a controlling precedent, however. In 1972, every death sentence in America was set aside on the basis of a *per curiam* opinion which said only "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman* v. *Georgia*, 408 U. S. 238, 239-240 (1972). The task in such a case is to determine what the precedent really means.

"The principle of the case is found by taking account (a) of the facts treated by the judge as material and (b) his decision as based on them." Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L. J. 161, 182 (1930). The decision in *Peters* is clear enough: a white defendant had standing to challenge the exclusion of blacks. Whether that case is binding precedent for this case depends on whether any of the material facts are distinguishable in a way which is relevant to the standing question.

The material facts of *Peters* were as follows. "Negroes were systematically excluded from the grand jury that indicted him and the petit jury that convicted him." *Peters*, *supra*, 407 U. S., at 494. Peters himself was not a member of the excluded group. *Ibid.* The petit jury claim was not included in the petition for certiorari. *Id.*, at 495. The problem with the selection system was that "[t]he jury lists were made up from the tax digests, which were by law segregated according to race. . . ." *Id.*, at 496, n. 3. The Fifth Circuit had determined in another case that the jury selection system in the county in question was unconstitutional. *Ibid.*

There are, to be sure, differences between *Peters* and the present case. But are any of these differences material to the standing question? Amicus submits that they are not.

The principles of standing were surveyed in *Warth* v. *Seldin*, 422 U. S. 490 (1975). The first requirement is the Article III "case or controversy" requirement, *id.*, at 498-499, but this is not a problem when the claim is asserted defensively, *id.*, at 500, n. 12, as it is in this case. The remaining questions are questions of prudence rather than power. *Id.*, at 499-500.

> "First, the Court has held that when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. [Citations.] Second, . . . this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, at 499.

> "Essentially, the standing question [in cases involving rights created by statute or constitutional provision] is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties. [Citations.] In such instances, the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff." *Id.*, at 500-501 (footnote omitted).

The court of appeals believed that *Peters* was a grand jury case rather than a petit jury case and distinguished it on that basis. J. A. 27. This difference is not material. A defendant is injured *more* directly by discrimination in petit jury selection than he is by grand jury selection. See generally *Vasquez* v. *Hillery*, 474 U. S. 254, 271 (1986) (Powell, J., dissenting). Furthermore, the same principles govern both grand and petit jury discrimination claims. *Peters*, 407 U. S., at 495 (lead opinion). The concurrence in *Peters* is based primarily on a statute which proscribes grand and petit jury discrimination alike. *Id.*, at 505-506; 18 U. S. C. § 243. The concurrence's reference to the grand jury alone, 407 U. S., at 507, is probably just a reflection of the question presented on certiorari.

The greatest difference between *Peters* and the present case is between the drawing of the venire and the selection of the jury from that venire. That is an important difference, but is it different in a manner which would confer standing in the former case and deny it in the latter? Just the opposite.

Complaints about the drawing of jury lists in the county as a whole is a much more generalized grievance, common to a much larger class of persons, than is a complaint about the misuse of peremptory challenges in an individual case. The former complaint is quite likely to be raised by another party with clearer standing, as indeed it had been in Peters' case. 407 U. S., at 496, n. 3. The latter complaint is unlikely to be raised at all if Powers cannot raise it.

In both cases, the persons actually discriminated against are the excluded venire members. If either case presents "countervailing considerations," *Warth*, *supra*, 422 U. S., at 500, sufficient to confer third-party standing, it is the present case. The excluded class might bring a civil action to enjoin *systematic* underrepresentation,[2] but the chances of individual, peremptorily-challenged venire members bringing a civil action are nil. Most potential jurors are pleased to be free of the burden of jury duty, but even one who feels deeply insulted is unlikely to incur the personal expense of a civil action.

The only differences between this case and *Peters* which are material to standing thus give Powers a *greater* claim to standing than Peters had. If *Peters* is not to be overruled, Powers must have standing.

---

2. The right to bring such an action is recognized in *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320 (1970).

II. *Peters* is based on the statute.

While *Peters* and stare decisis are sufficient to resolve the standing question, they do not provide a coherent explanation of the answer. The lack of a majority in *Peters* left us with a result without a reason. The nation deserves a reason.

Fortunately, this Court has provided guidance for dealing with fragmented decisions. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . . ' " *Marks* v. *United States*, 430 U. S. 188, 193 (1977), quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

In *Peters* v. *Kiff*, 407 U. S. 493 (1972), there were six Justices concurring in the judgment. Three joined the lead opinion of Justice Marshall, and three joined the concurring opinion of Justice White. The question under *Marks/Gregg* is which of these opinions is "on the narrowest grounds."

After summarizing the facts and the history of jury discrimination cases, the lead opinion states "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." 407 U. S., at 502. Furthermore, "a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." *Ibid.* "[T]he exclusion from jury service of a *substantial and identifiable class* of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases." *Id.*, at 503 (emphasis added).

The tone of the concurrence is quite different. After quoting 18 U. S. C. § 243, the concurrence notes

> "By this unambiguous provision, . . . Congress put cases involving exclusions from jury service on grounds of race in a class by themselves. 'For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination.' " *Id.*, at 505-506, quoting *Fay* v. *New York*, 332 U. S. 261, 282-283 (1947).

The concurrence therefore "would implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination," by conferring broad standing. *Id.*, at 507.

The *Marks/Gregg* rule does not ask which opinion is better, but only which is based on the narrowest grounds. The concurrence is clearly the narrower. While the lead opinion speaks of "the appearance of bias" and "the exclusion . . . of a substantial and identifiable class," the concurrence is tightly bound to violations of a specific statute which deals only with discrimination in jury selection on the basis of "race, color, or previous condition of servitude." Thus the holding of the *Peters* Court is the position taken by Justices White, Brennan, and Powell.

In addition to being the narrowest ground, the statute is also a common thread linking the two opinions. The lead opinion's reliance on the statute is more subtle, but it is there. The statute is relied on for the illegality of the tribunals, *Peters*, 407 U. S., at 497-498, as the cornerstone of the trilogy of cases which first dealt with jury discrimination, *id.*, at 498-499, and as a justification for the conclusion, *id.*, at 504-505. Thus both the *Marks/Gregg* rule and a search for common ground in the two opinions lead to the same conclusion: the *ratio decidendi* of *Peters* is that 18 U. S. C. § 243 confers standing on a white defendant to challenge the exclusion of blacks from jury service.

III. Racial exclusion via peremptories is a violation of the statute, regardless of defendant's race.

Up to this point we have been discussing "standing" as an issue separate from the merits of the claim: "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal. . . . " *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975). A related but distinct argument for affirmance in this case would be that *Batson* v. *Kentucky*, 476 U. S. 79 (1986) creates a special rule applying only to venire members of the defendant's race. Peremptory challenge of other races, this argument goes, is simply not a violation, even if the purpose is to exclude that group from the jury. There is language in *Batson* to that effect, see *id.*, at 96, and the court of appeal can hardly be faulted for relying on it. See J. A. 29-30. That issue, however, was not presented in *Batson*, and the comments of the Court "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399 (1821).

Two themes reverberate throughout this Court's jurisprudence on discrimination in jury selection: the importance of the statutes enacted by Congress on the subject and the detrimental impact on society of the discrimination. These two factors came together in *Peters* to break down the standing barrier, and the same combination should produce the same result in the present case. The use of peremptory challenges to exclude a particular race[3] is a violation of 18 U. S. C. § 243 and may be challenged by a party to the action regardless of whether he belongs to that group.

---

3. The word "race" in Reconstruction-era statutes means something different than the present usage. It includes groups which "are subject to intentional discrimination solely because of their ancestry or ethnic characteristics." *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 613 (1987); see also *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880) ("Celtic Irishmen").

A. Importance of the Statute.

The central importance of the statute was emphatically stated in *Fay* v. *New York*, 332 U. S. 261 (1947) which rejected a Fourteenth Amendment claim based on nonracial discrimination.[4] Reviewing the early history of the jury cases, *Fay* stated "[f]or us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination. This statute was a factor so decisive . . . that the Court [in *Ex parte Virginia*, 100 U. S. 339, 345 (1880)] even hinted that there might be no judicial power to intervene except in matters authorized by Acts of Congress." *Fay*, *supra*, at 282-283.

Hill v. *Texas*, 316 U. S. 400, 404 (1942) relies heavily on the statute to support its conclusion that grand jury discrimination is sufficient to reverse a conviction. The Court concluded in that case that notwithstanding the defendant's guilt, "no state is at liberty to impose upon one charged with a crime a discrimination in its trial procedure which the Constitution, *and an Act of Congress passed pursuant to the Constitution*, alike forbid." *Id.*, at 406 (emphasis added).

In *Cassell* v. *Texas*, 339 U. S. 282 (1950), the Court once again invoked the statute for the proposition that a racial quota was illegal and a violation of the defendant's rights. "While the language of the section directs attention to the right to serve as a juror, *its command has long been recognized also to assure rights to the accused*. . . . Proportional racial limitation is therefore forbidden. An accused is entitled to have charges against him considered by a jury in the selection of which there has been *neither inclusion nor exclusion because of race*." *Id.*, at 287 (emphasis added).

---

4. The specific result in *Fay* has since been overtaken by the Sixth Amendment cross-section jurisprudence. See, *e.g.*, *Duren* v. *Missouri*, 439 U. S. 357 (1979) (excusal of women on request). *Fay* is still good law for equal protection claims, however.

B. Interests Other Than Defendant's.

The second recurring theme is that more is at stake here than the interest of the defendant in a fair trial. *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1880) noted that singling out one race as being presumptively unfit for jury service was a brand of inferiority upon them and a stimulant to racial prejudice. Is that brand any less degrading when the group is removed from a case with no racial overtones? On the contrary, such removal results from an opinion on the part of the attorney making the challenge that black jurors will not uphold the law in *any* case. That assumption is far *more* insulting than a concern that they will overly sympathize with a member of their own group.

The grand jury cases would make no sense if the defendant's interests alone were at stake. Justice Jackson noted in dissent in *Cassell* v. *Texas*, *supra*, that where the defendant has been convicted by a properly constituted trial jury but proves discrimination in choosing the grand jury, "this conviction is reversed for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue." *Id.*, 339 U. S., at 299. "[N]o conviction should be set aside for errors not affecting substantial rights of the accused." *Ibid.*

Justice Jackson further contended that the statute did not give rights to anyone other than the excluded jurors, *id.*, at 300-301, and that criminal prosecutions and civil actions were appropriate and effective remedies for violations. *Id.*, at 303. The *Cassell* plurality did not directly answer Justice Jackson's objection, but the issue arose again in *Rose* v. *Mitchell*, 443 U. S. 545 (1979).

In *Rose*, Justice Stewart, joined by Justice Rehnquist, echoed the concern expressed in the *Cassell* dissent. *Id.*, at 574-575 (concurring in the judgment). The majority's answer was simple. It rejected the premises of Justice Jackson's argument.

Rose quotes the passage of *Strauder* quoted in part above, 443 U. S., at 555, and notes at length the damage to society of jury discrimination. Such discrimination "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process." *Id.*, at 555-556. It "impairs the confidence of the public in the administration of justice." *Id.*, at 556. "The harm is not only to the accused . . . . It is to society as a whole." *Id.* These considerations require a reversal to vindicate rights *other than the defendant's*. Other remedies are simply inadequate. *Id.*, at 558.

C. Dicta on the Group Membership Requirement.

Long ago, Chief Justice Marshall cautioned against putting too much weight on dicta. "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821).

The comments of this Court regarding the membership of defendant in the excluded race amply illustrate this principle. Almost all of the cases involve defendants of the same race as the excluded jurors. The history of American race relations leaves no doubt why. Yet the cases sometimes state that membership is a requirement and sometimes do not.

Strauder v. *West Virginia*, 100 U. S. 303, 309 (1880) refers to exclusion of "every man of his [defendant's] race." *Hill* v. *Texas*, 316 U. S. 400, 406 (1942), on the other hand, simply refers to the requirement that the state procedure obey the Constitution and the statute.

One might think that *Peters* v. *Kiff*, 407 U. S. 493 (1972) had settled the question, yet only five years later the membership requirement is explicitly stated in *Castaneda* v. *Partida*, 430 U. S. 482, 494 (1977) (emphasis added): "defendant must show . . . substantial underrepresentation of *his* race or of the identifiable group *to which he belongs*." Yet only two years later, another opinion by Justice Blackmun refers only to "*a* racial group," and exclusion of "*a* segment of the community." *Rose* v. *Mitchell*, *supra*, 443 U. S., at 556 (emphasis added).

From among these precedents, *Batson* v. *Kentucky*, 476 U. S. 79, 96 (1986) lifted the membership requirement from *Castaneda* v. *Partida*, *supra*. However, a look at the literal wording of the statute and the need to vindicate rights other than the defendant's will show that *Batson* protection should not be limited to defendants who are members of the group.

D. Batson and the Statute.

Like the grand jury cases discussed above, *Batson* relies heavily on the damage to the integrity of the judicial system which flows from intentional discrimination on the basis of race. Undermining of public confidence and stimulation of racial prejudice are once again cited. *Batson*, *supra*, 476 U. S., at 87-88. These interests do not depend on the race of the victim or on the party causing the exclusion.

The key holding of *Batson* is that "[w]hile decisions of this Court have been concerned largely with discrimination during selection of the venire, the principles announced there also forbid discrimination on account of race in selection of the petit jury." *Id.*, at 88. The only significant distinction between *Peters* and the present case is the stage of jury selection: venire versus petit jury. *Batson* says the same principles apply. The distinction is without a difference.

The wording of the statute leads to the same conclusion.

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State *on account of race*, color, or previous condition of servitude; and *whoever*, being an officer *or other person charged with any duty in the selection* or summoning of jurors, *excludes* or fails to summon any citizen *for such cause*, shall be fined not more than $5,000." 18 U. S. C. § 243 (emphasis added).

The statute is sweeping in scope, embracing the entire process of jury selection and every actor in it. The statute is

not limited to summoning venire members. The selection and exclusion stages are explicitly covered. Nor is the statute limited to "officers." It covers *any* person charged with *any* duty in the process.

Attorneys are certainly such people. They are charged with a duty to conduct voir dire and jury selection in the interests of their clients. See ABA Model Rules of Professional Conduct Rule 1.3, comment ¶ 1 (1983) ("zeal in advocacy"); ABA Model Code of Professional Responsibility DR 7-101 (1980); C. Wolfram, *Modern Legal Ethics* 578-579 (1986). This statute, however, places a limit on that function. If an attorney excludes any citizen on account of race that attorney has violated the statute. Under *Peters*, "the strong statutory policy of § 243", 407 U. S., 507 (concurrence) confers standing to object beyond defendants of the same race as the excluded persons.

IV. Statutory standing would extend the protection of *Batson* v. *Kentucky* to the victim.

Abuse of peremptory challenges is not limited to prosecutors, although challenges made by the prosecution have dominated the attention of the courts and commentators. See, *e.g.*, *Batson v. Kentucky*, 476 U. S. 79, 89, n. 12 (1986); *Swain v. Alabama*, 380 U. S. 202 (1965); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 Colum. L. Rev. 1357 (1985). Given the proper circumstances, the defense can also be motivated to make racially motivated peremptory challenges. See, Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky* 88 Colum. L. Rev. 355, 364-365 (1988); P. Di Perna, *Juries on Trial: Face of American Justice* 152 (1984).

This problem was recognized by Justice Marshall in his concurrence in *Batson*. "The potential for racial prejudice, further, inheres in the defendant's challenge as well." *Batson*, 476 U. S., at 108 (Marshall, J., concurring). If defendant is accused of committing a racially motivated crime, counsel might consider it important to peremptorily challenge every

venire member who is of the same race as the victim. One example is the racially charged "Howard Beach" case. In this case, four white teen-agers were charged with the killing of a black man in the Queens, New York neighborhood of Howard Beach. The trial court, in response to the prosecutor's contention that the defense had used peremptory challenges to exclude three prospective jurors because they were black, required the defense to justify further challenges, citing *Batson*. The intermediate appellate court affirmed. *People* v. *Kern*, 545 N. Y. S. 2d 4, 34 (1989). The Court of Appeals affirmed based on the state constitution. *People* v. *Kern*, No. 43, 47 Cr. L. 1021 (March 29, 1990).

A chilling example of the defense use of peremptory challenges is the case of Arthur McDuffie. McDuffie was a thirty-three-year-old black insurance salesman with no prior criminal record who died from head injuries received from the police while being arrested for running a red light. P. Di Perna, *Juries on Trial: Face of American Justice* 179 (1984). The defense used its peremptory challenges to guarantee an all white jury. After hearing six weeks of testimony, the jury took only two and a half hours to return a not guilty verdict. *Ibid.* In the ensuing riot:

> "Blacks ran through the streets chanting 'McDuffie! McDuffie!' and 'Where is justice for the black man in America?' Cars were overturned at the state building. More whites were beaten. The verdict had hit the tense community like gasoline on a flame, because it was perceived as an all-white cover-up. In the end, the riots left sixteen dead, several hundred injured, and approximately $100 million in damages." *Id.*, at 179-80.

The *McDuffie* case illustrates that society has a compelling interest in assuring that all parts of the community can be represented on juries. This means that neither the defense nor the prosecution should be permitted to use peremptory challenges to racially bias the jury.

> "Selection which is or even appears to be discriminatory obviously destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness. This is illustrated in the extreme by the impunity with which racial and civil rights crimes have been committed in the South." Kuhn, *Jury Discrimination: The Next Phase* 41 S. Cal. L. Rev. 235, 246 (1968) (footnote omitted).

Using peremptory challenges makes a jury less representative and more homogeneous as each side eliminates those who are thought to be hostile to its interests. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Thus both the prosecution *and* the defense must be prevented from having their assumptions regarding group bias reflected in the final composition of the petit jury if the goals of *Batson* are to be achieved.

The problem of discriminatory peremptory challenges by the defense was recognized in the leading pre-*Batson* peremptory challenge case, *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978). In *Wheeler*, the California Supreme Court recognized that defense peremptory challenges pose a threat similar to those of the prosecution, and therefore indicated that the defense would be held to the same standard as the prosecution in making peremptory challenges. 22 Cal. 3d, at 282, n. 29, 583 P. 2d, at 765, n. 29. See also *People v. Snow*, 44 Cal. 3d 216, 228-29, 746 P. 2d 452, 459 (1987) (Eagleson, J. concurring).[5]

California's experience in the twelve years since *Wheeler* demonstrates that limiting defense peremptories is practical. *Wheeler* objections by the prosecution have not been a sub-

---

5. *Wheeler* was based solely on California's state constitutional right to trial by jury: Cal. Const., art. I, § 16. *Wheeler*, 22 Cal. 3d, at 283-87, 583 P. 2d, at 766-68. Unlike the Sixth Amendment, the California Constitution extends the right of jury trial to the prosecution as well as the defense. See *People v. Terry*, 2 Cal. 3d 362, 377, 466 P. 2d 961, 968 (1970).

stantial source of litigation. *People* v. *Pagel*, 186 Cal. App. 3d Supp. 1, 232 Cal. Rptr. 104 (1986), cert. denied 481 U. S. 1028, appears to be the only reported case. Where the objection is needed, however, as in *Pagel*, the Howard Beach case, or the McDuffie case, it is extremely important that it be available.

Use of the statute eliminates any possible "state action" limitation on the regulation of defense peremptories. The constitutionality of Congressional prohibition of private discrimination is well established. See, *e.g.*, *Runyon* v. *McCrary*, 427 U. S. 160, 179 (1976).[6] Thus, the statute offers hope to a group of people long deprived of equal protection in its most fundamental sense: the minority victims of crime.

V. A special statutory rule is preferable to expanding constitutional standing.

Using 18 U. S. C. § 243 to give defendant standing to challenge the exclusion of blacks from his jury has a final advantage. This approach would avoid opening up third party standing in other kinds of equal protection cases. As this Court has indicated in past opinions, third party standing is an idea best avoided, particularly when the Constitution is involved. If the Equal Protection Clause of the Fourteenth Amendment is used directly as the source of standing for defendant, then standing to assert the equal protection rights of third parties could be widened dramatically.

A "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). Without this rule "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more

6. It is worth noting, though, that "state action" should not be a problem in any event. The state vests the power to challenge in defense counsel and enforces his exercise of it. *Cf. Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Id.*, at 500.

Relying on Justice White's concurrence in *Peters* v. *Kiff*, 407 U. S. 493 (1972) to give defendant standing under 18 U. S. C. § 243 avoids this problem. The statute limits itself to one type of claim: racial discrimination in jury selection.[7] Thus, statutory standing could only be used in that one situation, because that is the only type of wrong covered by section 243. Furthermore, using section 243 is an acceptable extension of standing under *Warth*. The *Warth* Court recognized that Congress can grant express or implied exceptions to the general requirements for standing. 422 U. S., at 501.

In summary, use of the statute as the basis of standing would avoid upsetting constitutional standing rules while broadening *Batson* protection to those in greatest need of it: the victims of "hate crimes." Amicus submits that this approach is both desirable and consistent with precedent.

Conclusion

The judgment of the Ohio Court of Appeals should be reversed.

Dated: April, 1990

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

7. See *supra* at 8, note 3 (definition of "race").